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No.

In the Supreme Court of the United States

October Term, 1982

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,

Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

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March 22, 1983

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QUESTION PRESENTED

Is the Michigan Agricultural Marketing and Bargaining Act in conflict with and therefore preempted by the Federal Agricultural Fair Practices Act of 1967?

PARTIES TO PROCEEDINGS BELOW

The appellants in this Court were appellants in the Michigan Supreme Court and plaintiffs in the trial court. They are:

1. Michigan Canners and Freezers Association, Inc. (now known as Michigan Food Processors Association, Inc.), a Michigan nonprofit corporation.

2. Forty-four individual and corporate members of the Michigan Canners and Freezers Association, Inc., who joined as plaintiffs at the time suit was initiated. Their names, too numerous to list in the caption, are set forth in the appendix at pages A112 through A114 and incorporated here by reference.

3. Dukesherer Farms, Inc., a Michigan corporation.

4. Ferris Pierson, an individual citizen of the State of Michigan.

The appellees in this Court were appellees in the Michigan Supreme Court and defendants in the trial court. They are:

1. The Agricultural Marketing and Bargaining Board, an administrative agency of the State of Michigan, represented below by the Michigan Attorney General.

2. Michigan Agricultural Cooperative Marketing Association, Inc., a Michigan corporation.

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THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

Appellants, plaintiffs below, appeal from a final judgment of the Supreme Court of Michigan, dated December 23, 1982, upholding the validity of the Michigan Agricultural Marketing and Bargaining Act.

REPORTED OPINIONS BELOW

The final opinion of the Michigan Supreme Court, dated December 23, 1982, has not yet been reported. That court's decision in an earlier appeal, which dealt with jurisdictional issues of state law, is reported at 397 Mich. 337, 245 N.W.2d 1 (1976).

GROUNDS FOR JURISDICTION

Appellants initiated this case by the filing of a complaint in the Michigan Circuit Court seeking injunctive and declaratory relief against the enforcement of the Michigan Agricultural Marketing and Bargaining Act, a statute of the State of Michigan. Among other averments, the complaint alleged that the state statute was unconstitutional because it was preempted by the Federal Agricultural Fair Practices Act of 1967. The trial court and the Michigan Supreme Court upheld the validity of the act on all grounds, including the ground of federal preemption. The Michigan Supreme Court issued a final judgment, see page A79, and supporting opinion, see pages A1 through A32, on December 23, 1982. No party requested a rehearing.

Appellants filed their Notice of Appeal to this Court with the Michigan Supreme Court and Circuit Court on March 8, 1983. See page A81. Appellants have docketed this appeal within ninety days of the final judgment below.

Appellants invoke the jurisdiction of this Court pursuant to Title 28 of the United States Code, Section 1257(2). The issue of the repugnancy of the state statute to the Federal Agricultural Fair Practices Act of 1967 was properly raised at each level of state court proceedings and was expressly considered and decided by the Michigan Supreme Court. See opinion, pages A4 through A17. This Court therefore has appellate jurisdiction. *See Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979); *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974); *Charleston Federal Savings and Loan Association* v. *Alderson*, 324 U.S. 182, 185-86 (1945).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause, Article VI of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Federal Agricultural Fair Practices Act of 1967, Title 7, United States Code, Sections 2301-2306 (1973):

> [Set out in full in the appendix, pages A84 through A88.]

Michigan Agricultural Marketing and Bargaining Act, Act 344 of the Public Acts of 1972, Michigan Compiled Laws, Sections 290.701-.726 (Supp. 1982):

> [Set out in full in the appendix, pages A89 through A111.]

STATEMENT OF THE CASE

A. Nature of the Case

This case involves the conflicting provisions and goals of federal and state statutes regulating agricultural bargaining. Congress passed the Agricultural Fair Practices Act of 1967 (hereafter the "Federal Act") on April 16, 1968. The Federal Act seeks to accommodate the potentially conflicting interests of individual farmers, cooperatives of farmers and purchasers of farm products. It balances those interests by protecting the rights of individual farm-

ers to join together in cooperative associations, while safeguarding the rights of individual farmers to remain independent and the rights of purchasers to deal with farmers of their choice.

Four years later, the Michigan legislature enacted the Michigan Agricultural Marketing and Bargaining Act (hereafter the "Michigan Act"). The Michigan Act differs radically from the Federal Act. Rejecting the free market system adopted in the Federal Act, the Michigan Act provides for a form of compulsory unionism in the farm area. Once a cooperative representing a majority of farmers and products has been accredited under the Michigan Act, individual farmers in the unit are bound by all terms and conditions negotiated by the association, and individual negotiation is thereafter prohibited.

Because the Michigan Act stands as a clear obstacle to the accomplishment of the Federal Act's goals and purposes and because it is literally impossible to comply with both statutes, appellants began this action to declare the Michigan Act unconstitutional. Specifically, appellants challenge the following provisions of the Michigan Act: Section 4(1)(g) and 4(1)(h) [(Mich. Comp. Laws § 290.704(1)(g), (h)]; Section 10(1), the third and fifth sentences and Section 10(2), the last sentence [(Mich. Comp. Laws § 290.710)]; Section 13(1), the first and third sentences [(Mich. Comp. Laws § 290.713)].

B. Parties

Appellants include representatives of both groups directly affected by the Michigan Act: farmers (called "producers" in both acts) and processors of fruits and vegetables (called "handlers" in both acts). Michigan Canners and Freezers Association, Inc. is a nonprofit corporation having as its members processors of fruits and

vegetables. The forty-four individual members of the association are asparagus processors who joined as parties plaintiff to this action. Dukesherer Farms, Inc. is a corporation engaged in asparagus farming. Ferris Pierson is also an asparagus farmer.

Appellee Agricultural Marketing and Bargaining Board ("the Board") is an administrative agency of the State of Michigan established under section 3 of the Michigan Act. The Board was established for the purpose of administering and enforcing bargaining between producers and handlers of various agricultural commodities, including asparagus.

Appellee Michigan Agricultural Cooperative Marketing Association, Inc. ("MACMA") is a Michigan agricultural cooperative. As a cooperative association that bargains on behalf of producers, MACMA is a "handler" under the Federal Act, 7 U.S.C. § 2302(a)(3), but is not a handler under the Michigan Act, Mich. Comp. Laws § 290.702 (a), (g).

C. Proceedings Below

On January 25, 1974, the Board accredited MACMA as the sole sales and bargaining representative for all producers included in the Michigan asparagus bargaining unit, as that unit had been defined in an earlier Board order. Acting pursuant to the Michigan Act, MACMA thereafter negotiated on behalf of the bargaining unit members, including appellants Dukesherer Farms and Pierson, regarding the 1974 asparagus crop. These actions were performed over the objection of all appellants.

On March 7, 1974, appellants filed a complaint in the Ingham County Circuit Court challenging the Michigan Act and the Board's actions in connection with the asparagus bargaining unit. The complaint raised a number of

federal and state claims, including the claim that the Michigan Act was unconstitutional because it was preempted by the Federal Act.

On motion of defendants, the Circuit Court dismissed the complaint, holding that the state court of appeals had exclusive subject matter jurisdiction under state law. (See order and opinion, pages A33 through A37). Appellants thereafter unsuccessfully sought review in the Court of Appeals. (See pages A38 through A41). On January 15, 1975, the Michigan Supreme Court granted leave to appeal the dismissal and invited the parties to brief the substantive issues of constitutionality, which included the federal preemption issue. (See order, page A42).

On March 18, 1975, appellants filed their brief on appeal in the Michigan Supreme Court, preserving the following question: "1. Is the Agricultural Marketing and Bargaining Act unconstitutional because it conflicts with federal Agricultural Fair Practices Act of 1967, and is thereby preempted by such legislation?"[1] On review of the lower court dismissal, the Michigan Supreme Court reversed, holding that the Circuit Court did have subject matter jurisdiction to consider the constitutional challenges to the Michigan Act. (See opinion, pages A44 through A55). The action was remanded for the development of a factual record, made necessary by appellant's police power claim. (See opinion, page A46). The court therefore did not reach the merits of the preemption issue.

The Circuit Court conducted a non-jury trial between September 6 and September 27, 1977. Appellants again briefed and argued the preemption issue raised in

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1. Under Michigan practice, questions are preserved for appeal by their inclusion in the "Statement of Questions Involved" in an appellant's brief. Mich. Gen. Ct. R. 813.1.

this appeal. In an opinion filed February 2, 1981, the Circuit Court considered the preemption issue and held that the Federal Act did not preempt the Michigan Act. (See opinion, at pages A60 through A76).

The parties returned to the Michigan Supreme Court, pursuant to the court's reservation of appellate jurisdiction. Appellants' brief again raised the preemption issue in the "Statement of Questions Involved" and presented arguments and authorities in support of preemption. The Michigan Supreme Court considered and rejected appellants' contention, holding that the Federal Act did not create or preserve the right of individual producers or processors to bargain individually and so was not inconsistent with the Michigan Act. (See opinion, pages A4 through A17, and final judgment, pages A79 through A80.) The court also held, on a prospective basis, that future accreditations under the Michigan Act must be conducted in accordance with the notice and hearing procedure of the state administrative procedures act. This state law ruling did not affect the validity of the Michigan Act or the accreditation of the asparagus bargaining unit. This appeal involves only the question of federal preemption.

THE QUESTION PRESENTED IS SUBSTANTIAL

I. THIS APPEAL IS MERITORIOUS BECAUSE THE MICHIGAN AGRICULTURAL MARKETING AND BARGAINING ACT IS PREEMPTED BY THE FEDERAL AGRICULTURAL FAIR PRACTICES ACT OF 1967.

A. This Appeal Involves Important Issues Of Federalism And Turns Upon The Construction Of An Act Of Congress.

The preemption doctrine is rooted in the Supremacy Clause of Article VI of the United States Constitution. Because it involves the Supremacy Clause, preemption implicates our basic notions of federalism. *Community Communications Co.* v. *City of Boulder, Colo.*, 455 U.S. 40, 60 (1982) (Rehnquist, J. dissenting).

The doctrine invalidates state regulation in two distinct situations. Whenever Congress has occupied an entire field of regulation, the Supremacy Clause will be invoked to preempt all state laws on the subject matter in question. In such a case, any state regulation of the subject matter is barred, even if the state statute is harmonious with the federal enactments. *See, e.g., Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

This type of preemption is not present in this case. It is clear that the Federal Act has not completely "occupied the field". Section 2305(d) of the Federal Act provides that "existing state law" shall not be changed or modified by the Federal Act. The Federal Act thus leaves some latitude for regulation by the states.

The Michigan Act is, however, preempted under the second preemption standard. When Congress has not com-

pletely occupied a field of regulation, a state law is nevertheless preempted to the extent that it conflicts with federal law. There are two types of conflict that give rise to a finding of preemption. This Court delineated the two alternative methods for determining whether conflict preemption exists in *Fidelity Federal Savings and Loan Association* v. *De La Cuesta*, ... U.S. ....., 102 S. Ct. 3014 (1982): "Such a conflict arises when compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Id.* at ....., 102 S. Ct. at 3022 (citations omitted).

The Michigan Supreme Court was bound to apply these principles in deciding appellants' preemption claim. When faced with a potential conflict between federal and state laws, state courts typically resolve the conflict by giving their own law a "narrowing construction". The Michigan Supreme Court strayed from that course. It resolved the apparent conflict between the Federal Act and the Michigan Act by giving its own law a broad interpretation, while narrowly construing the Federal Act. The court accordingly held that the Federal Act did not create or protect rights of private dealing (opinion, page A8); that "Section 2304 [of the Federal Act] is nothing more than an explanation of what [the Act] was not intended to do" (*Id.*, page A8); and that there was "no intent on the part of Congress, as plaintiffs assert, to affirmatively 'strike a balance' among competing interests." (*Id.*, page A14).

The Michigan Supreme Court left no doubt that its finding of a lack of preemption rested upon a construction of the Federal Act: "Were we to agree that § 2304, or any provision in [the Federal Act], was meant to affirmatively *create* or *protect* rights of private dealing between individual producers and processors, we would agree

that [the Michigan Act] must fall because, plainly, [the Michigan Act] conflicts with that result. However, we do not find such meaning in the provisions of the federal act." (*Id.*, page A8).

As is shown below, the court's conclusion is contrary to the Federal Act's plain language, its legislative history and the decisions of the lower federal courts. This appeal therefore presents a single issue: whether a state court was correct in its restrictive interpretation of an Act of Congress. That issue is one particularly appropriate for resolution by this Court.

B. The Michigan Act Stands As An Obstacle To The Accomplishment Of The Full Objectives Of Congress As Expressed In The Federal Fair Practices Act And Is Therefore Pre-empted.

1. The Regulatory Schemes Established By The Federal And State Acts Are Fundamentally Inconsistent.

The United States Congress and the Michigan legislature have each passed legislation to protect a farmer's right to join a cooperative association, and to bargain collectively through that association. Although the Michigan and Federal statutes share one common goal, they establish regulatory schemes that are irreconcilably in conflict.

Congress chose to protect a farmer's right to bargain through an association only insofar as that right does not conflict with the rights of purchasers of farm products and the rights of individual farmers who wish to remain independent of collective bargaining associations. The Federal Act evidences three distinct goals. First, the Federal Act authorizes the formation of voluntary collective marketing associations by farmers and prohibits

discrimination against farmers on the basis of membership in such associations. 7 U.S.C. §§ 2301, 2303. Second, it protects an individual farmer's right to remain independent of a marketing association and prohibits interference with that right by processors and cooperative associations. 7 U.S.C. §§ 2301, 2303. Finally, the Federal Act protects the right of purchasers of farm commodities to deal freely with the customers of their choice. 7 U.S.C. § 2304.

Congress passed the Federal Fair Practices Act after four years of intense debate and substantial restructuring of the original bill. Congress considered the various alternative systems of regulation and chose to strike a careful balance among the potentially conflicting interests of individual farmers and purchasers as well as cooperative associations, while preserving the free competition that is a cornerstone of the American economic system. Two federal district courts have therefore stated that the act is the product of "conflicting interests and intent". *Garrison* v. *Dairymen, Inc.*, Civ. Action No. 80-1080-3, slip op. (D.S.C. July 28, 1980); *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227, 234 (N.D. Ohio 1974).

In 1972, four years after the passage of the Federal Act, the Michigan Legislature passed the Michigan Agricultural Marketing and Bargaining Act. The Michigan Act protects the rights of farmers who wish to join cooperatives, but completely eliminates the rights of individual farmers and purchasers to deal directly with each other. Instead, the Michigan Act replaces the free market system established by the Federal Act with a closed union shop.

There is no question concerning the meaning or effect of the Michigan Act, since it has been authoritatively construed by the state supreme court. As interpreted by the state court, the act allows accreditation of a cooperative association representing a majority of producers

who produce a majority of a certain crop, such as asparagus. Once accredited, that association becomes the exclusive bargaining agent for all Michigan asparagus growers in the defined unit. Mich. Comp. Laws §§ 290.710, 713. Those asparagus growers who do not wish to join the association are nevertheless bound by all of the terms and conditions of the association's contracts with asparagus purchasers, and must help support the association by paying a service fee. Mich. Comp. Laws § 290.710. The Michigan Act makes it unlawful for an asparagus purchaser to negotiate or contract directly with an asparagus farmer who is included in such a bargaining unit, even if that farmer has chosen not to join the association. Mich. Comp. Laws § 290.704(1)(g). Additionally, a purchaser *must* bargain with an accredited association if it has had prior substantial dealings with the association or its members. Mich. Comp. Laws § 290.704(1)(h). (See opinion, pages A6 through A7).

The provisions of the Michigan Act cited above are in irreconcilable conflict with the Federal Act. They eliminate a purchaser's federal right to deal directly with a farmer, and the farmer's concomitant right to sell his crops independent of an association. As shown below, the Michigan legislature's substitution of a compulsory union system for the free market system prescribed by Congress overrules the careful balance struck by Congress in the Federal Act.

(a) The Federal Act Protects An Individual Farmer's Right Not To Join Or To Bargain Through A Cooperative, And The Michigan Act Destroys This Right.

Section 2301 of the Federal Act states the Congressional policy that farmers should be "free to join together *voluntarily* in cooperative organizations as authorized by

law" (emphasis added). At the same time, Section 2303 (a) gives producers the "*right* to join and belong or *to refrain from joining or belonging* to an association of producers" and protects that right from interference by "handlers" (emphasis added). As recognized by the lower federal courts, the statutory definition of handler includes cooperative associations themselves. 7 U.S.C. § 2302(a)(3); *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227, 235 (N.D. Ohio 1974); *Marketing Assistance Plan, Inc.* v. *Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1124 (S.D. Tex. 1972). Congress thus consciously sought to protect the right of farmers to remain independent of cooperative associations and prohibited interference with that right by cooperatives themselves. *See* S. Rep. No. 474, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1870.

The Federal Act's legislative history demonstrates that Section 2303(a) means what it says: Congress intended to preserve a farmer's right to deal either individually or through a cooperative. The report of the Senate Committee on Agriculture and Forestry makes this point clear: "This bill is designed *to protect* the agricultural producer's *right* to decide, free from improper pressures, whether or not he wishes to belong to a marketing or bargaining association." S. Rep. No. 474, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1867 (emphasis added). As Senator Williams observed during the Senate Subcommittee hearings, the "freedom of choice of any farmer to join or not to join an organization of his choice is a basic American right, and it must be protected." Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry, United States Senate, 90th Cong. 1st Sess. 10 (1967) (hereinafter cited as Senate Hearings). The state-

ments of other members of Congress during floor debates are to the same effect. 114 Cong. Rec. 7449-51 (statements of Reps. Latta, Poage and May 1968).

Congress deliberately protected the producer's right to deal free of any association, as well as the freedom to join one:

> The objective of the bill is to protect the producer in the exercise of a free choice. Many witnesses suggested that the bill did not fully accomplish this purpose, because it protected the producer only from improper pressure not to join an association. To protect his free choice he should also be protected from improper pressure in the other direction, that is, improper pressure to join an association. The committee did not have before it any testimony to indicate that producers were being subjected to any improper pressure to join associations, but was convinced by the logic of the situation that if the objective is to protect the producer and afford him a free choice, the bill should protect him from pressure in either direction.

S. Rep. No. 474, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1871. There is accordingly no room to argue that the Federal Act seeks only to protect the right to join associations.

The legislative history of the Federal Act also clearly shows that Congress intended to protect the *economic* right to refrain from dealing through an association, and not simply the formal *associational* right not to become an official cooperative member. As Senator Jordan stated: "The law intends that . . . he should not be made to join unless he wants to join. He ought to be able to sell anywhere he wants to sell." Senate Hearings,

supra page 13, at 170. The comments of the members of the House of Representatives consistently support this interpretation. As Chairman Poage explained to the House: "We made of the original legislation a two-way proposal which would actually assure to any producer the right to belong or not to belong to a cooperative. . . . We certainly felt it unfair to deny any man the right to sell his crop because he belongs to a group." 114 Cong. Rec. 7451 (1968). Such comments appear throughout the legislative history of the Federal Act.

It is clear from Section 2303(a) of the Federal Act itself, and the abundant legislative history, that Congress intended to protect a farmer's right not to join or deal through an association. If, therefore, a group of farmers in a cooperative association coerced an unwilling farmer into marketing his produce through the association, the cooperative's conduct would be a clear violation of Section 2303(a).

In contrast, the Michigan Act decrees that after an association is accredited, an individual farmer in that association's bargaining unit may no longer negotiate individually with a handler for the sale of his crops. Instead, the farmer is bound by the terms and conditions of the association's contracts, and the association is legislatively appointed as his "exclusive representative." Mich. Comp. Laws § 290.713. The farmer is irrevocably bound by the activities of the association even if he has not voluntarily joined that association. (See Michigan Supreme Court opinion, pages A5 through A8). The only significant difference under the Michigan Act between a "member" and a "nonmember" of an association is that a member has voluntarily appointed the cooperative association as his exclusive agent. Mich. Comp. Laws § 290.702(i).

The Michigan Supreme Court did not deny that the Michigan law destroys the freedom of a non-consenting farmer to deal individually. According to the court, this effect of the Michigan Act does not contravene the Federal Act because the Federal Act was not "meant to affirmatively create or protect rights of private dealing between individual producers and processors." (See opinion, page A8). The sole goal of the Federal Act, the court said, was to protect the right to form cooperatives and to prevent "handler" coercion.

The state court was wrong on two grounds. First, the language of Section 2303(a), and its supporting legislative history, make it patent that Congress was protecting the "right to . . . *refrain from joining* or belonging to an association," 7 U.S.C. § 2303(a) (emphasis added), as well as the right to join associations. Congress could not have used more explicit language in the protection of the right to be free of an association, nor could the members of Congress have been more direct in their statements, quoted above, recognizing that right. In holding that the Federal Act has but a single goal, the Michigan Supreme Court ignored the language and history of Section 2303(a) and the square holdings of two federal district courts. *Garrison* v. *Dairymen, Inc.*, Civ. Action No. 80-1080-3, slip op. (D.S.C. July 28, 1980); *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227 (N.D. Ohio 1974).

Second, the "handler" coercion prohibited by the Federal Act includes coercion by cooperatives themselves. A reading of the state court opinion demonstrates that the court ignored this important fact. The state court expressly, and improperly, equated the terms "handler" and "processor" (opinion n.7, page A5) and thereby nullified Congress' intent to protect individual farmers against associations themselves. Cooperatives are "handlers" under

the Federal Act (see discussion at pages 12-13 above), and the prohibitions of Section 2303(a) against handler interference with the right not to join associations therefore applies to cooperatives.

Read in light of the statutory inclusion of associations in the definition of handler, the state court's limitation on the scope of the Federal Act is clearly unconstitutional. The state court found that "[i]t [Section 2303(a)] merely protects a producer from being unduly influenced *by a handler* in deciding whether or not to join a cooperative marketing association," (opinion, page A10), and that "[i]ts [the Federal Act's] principal purpose is to insulate individual producer choice from handler coercion." (*Id.*, pages A14-A15). Yet, if the word "cooperative" is substituted for "handler" in the state court's ruling, appellants' point is clearly demonstrated: Congress intended to protect producers against the cooperative's interference with the right not to join an association. Therefore, the Michigan Supreme Court's holding that the relationship between cooperatives and nonmembers is a federally "unregulated area" is untenable.

It is hard to imagine a more complete abridgement of a producer's federal rights than is created by the Michigan Act. In Michigan, nothing remains of a farmer's right to refrain from joining an association. The Michigan Act allows a group of producers to band together and, so long as they represent a majority of farmers and product, dictate their price, conditions and terms of sale to all non-consenting farmers. This is precisely the conduct forbidden by Section 2303(a) of the Federal Act.

In summary, the Michigan Supreme Court clearly erred when it held that the Federal Act did not create or preserve an individual farmer's right to deal free of an association. By the court's own admission, the exis-

tence of such a federal right is fatal to the conflicting provisions of the Michigan Act.

(b) The Federal Act Protects A Handler's Right To Deal Individually With A Farmer, And The Michigan Act Eliminates This Right.

The language and legislative history of the Federal Act also demonstrate Congress' intent to protect a processor's right to deal individually with farmers, which is directly contravened by the Michigan Act.

When the first agricultural marketing bill was introduced in 1964, it encountered a great deal of resistance. H.R. 11146, 88th Cong., 2d Sess. (1964), S. 2849, 88th Cong., 2d Sess. (1964). This bill simply prohibited various specified acts of discrimination against members of farm cooperatives, and provided for criminal penalties for such discrimination.

Senate hearings on the bill began in 1966. Many Senators and witnesses expressed concern during these hearings that the bill could be construed as substituting a collective bargaining system for the existing free m ket system. The American Farm Bureau, the group that had originally sponsored the bill, attempted to dispel these fears. Charles Shuman, the American Farm Bureau representative, testified at the Senate hearings: "We want to emphasize that Farm Bureau does not seek, and will not support, legislation . . . to force processors to negotiate with marketing associations. We seek only legislation which sets forth rules of fair play." Hearings on S. 109 Before the Subcomm. of the Senate Committee on Agriculture & Forestry, 89th Cong., 2d Sess. 15 (1966).

Despite these reassurances from the bill's original sponsors, Congress remained concerned about this issue

See R. Torgerson, Producer Power At The Bargaining Table, A Case Study of the Legislative Life of S. 109 (1970) (hereinafter cited as "Torgerson"). The bill was not reported out of committee in 1966, and was reintroduced in the Senate in 1967. Hearings were again held, and the same concerns were expressed. Various parties expressed their grave concern over whether this was in effect a "Wagner Act", endorsing or allowing unionism in the farm industry. *See* 113 Cong. Rec. 7409 (1967); Torgerson, at pp. 95, 127, *et seq.*

Throughout the various hearings, the Subcommittee members expressed their desire that the free market competitive system remain unimpaired. *See, e.g.,* Senate Hearings, *supra* page 13, at 110. Proponents of the bill assured the Senators that the bill would not impair free competition, or institute compulsory bargaining. For example, Senator Lausch, a co-sponsor of the bill, testified that "this bill does not at all deprive the purchasers or what are called handlers in the bill, of the right to choose from whomever they wished to buy. That is their Constitutional right." *Id.,* at 14.

Despite these assurances, the Committee wished to make it absolutely clear that a handler's right to deal with the individual farmer of his choice was protected, and that the bill did not provide for a compulsory union system of bargaining. The Committee therefore amended the bill by adding a new section 5. The bill as finally passed included section 5, now codified at 7 U.S.C., Section 2304:

> *Disclaimer of Intention to Prohibit Normal Dealing.* Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers,

> nor require a handler to deal with an association of producers.

The Senate Committee Report acknowledged that the proponents of the bill had stated that it was not their intention to require a handler to deal with an association of producers. However, the Committee stated:

> There was some concern . . . that the bill in fact went further than intended. The Committee felt that a clear statement in the bill itself would be helpful to courts, handlers, associations, producers, and others in their construction of this legislation.

S. Rep. No. 474, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1873.

The Senate finally passed the Fair Practices bill with the new disclaimer provision, and the bill was then considered by the House of Representatives. Representative Fred Schwengel testified before the House Committee on Agriculture that the bill as amended "would not end competition by preventing other purchasers from offering a producer a better price or contract than is available through his marketing association. . . . The rights of purchasers are protected . . . purchasers are free to deal with whomever they choose. This includes the right to refuse to deal with a marketing association." Hearings on H.R. 13541 Before the Comm. on Agriculture, House of Representatives, 90th Cong., 1st Sess. 36 (1968). By adding the disclaimer provision now contained in Section 2304, Congress clearly evidenced its intent to protect the rights of purchasers, and to preserve the competitive system.

Two federal courts have considered the import of the language contained in Section 2304. Both courts have held that Section 2304 confers upon a purchaser the right to

continue to deal directly with a farmer even though that farmer may become a member of an association. *Garrison* v. *Dairymen, Inc.*, Civ. Action No. 80-1080-3, slip op. (D.S.C. July 28, 1980); *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227, 237 (N.D. Ohio 1974).

It is therefore clear from the language of the Federal Act, its legislative history, and the consistent construction of the federal courts interpreting the Act, that one Congressional objective in passing the Act was to protect the right of a handler to continue to deal individually with a farmer, regardless of that farmer's membership or other involuntary inclusion in an association. While Congress also intended to protect the right of the farmer to join, or not to join, an association, Congress conferred that right only insofar as it would not conflict with the handler's right to deal with farmers on an individual basis. Thus Congress struck a careful balance among the interests of farmers, associations, and handlers in the Federal Act.

The Michigan Supreme Court acknowledged that a handler's freedom to deal individually with a farmer is destroyed by the Michigan Act (opinion, pages A5 through A8). Under the Michigan Act, an accredited association becomes the "exclusive representative of all producers in the bargaining unit for the purpose of bargaining with all handlers that purchase the agricultural commodity produced in the bargaining unit". Mich. Comp. Laws § 290.713. The association's exclusive bargaining rights extend to all terms relative to trading between handlers and producers of the given agricultural commodity, including price, quality and quantity. *Id.* A handler's right to deal individually with a farmer is completely eliminated by section 4(1)(h) of the Michigan Act, which makes it an unfair practice for a handler to negotiate with a producer included in the bargaining unit after an association is accredited, even if that

producer has not joined the association. Mich. Comp. Laws § 290.704(1)(h).

In order to avoid a conflict, the Michigan Supreme Court held that section 2304 of the Federal Act does not prevent *the states* from legislatively removing the rights therein conferred. It ruled that Congress intended only to protect the rights of farmers to join cooperatives, and that the remainder of the Federal Act is surplusage that the states can legislatively remove.

This argument flies in the face of the plain language, legislative history and consistent judicial interpretations of the Federal Act. As the legislative history and the decisions of the district courts show, section 2304 of the Federal Act was intended "to protect the handler's right to deal directly with the producer even though the producer in joining the cooperative may have assigned exclusive agency rights to the association. . . ." *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227, 237 (N.D. Ohio 1974).

Congress clearly intended to protect the rights of handlers in the Federal Fair Practices Act, just as it protected the rights of farmers. The State cannot legislatively remove this federal protection without violating the Supremacy Clause of the United States Constitution.

2. The Conflicts Between The Federal And State Acts Require A Finding That The Michigan Statute Is Preempted.

The preemption doctrine is designed to eliminate precisely the type of statutory conflict presented in this case. The Michigan Act is not saved from preemption merely because it shares a common goal with the Federal Act of protecting the farmers' right to band together in cooperatives, as suggested by the Michigan Supreme Court.

The federal courts have determined that a shared goal will not spare a state law from preemption if it otherwise is inconsistent with the full purposes and objectives of the conflicting federal law. *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977).

In fact, this analysis was recently applied to invalidate several state statutes regulating corporate takeover offers because the state acts conflicted with the Williams Act, 15 U.S.C. § 78m(d), (e), 78n(d), (e), (f). *See National City Lines, Inc.* v. *LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982); *Mite Corp.* v. *Dixon*, 633 F.2d 486 (7th Cir. 1980), *aff'd on other grounds sub nom. Edgar* v. *Mite Corp.*, ... U.S. ....., 102 S. Ct. 2629 (1982);[2] *Dart Industries* v. *Conrad*, 462 F. Supp. 1 (S.D. Ind. 1978); *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979).

Each court acknowledged that the state and federal acts shared the common goal of investor protection, and that Congress and each state took a similar approach to protecting that goal through requiring certain disclosures to shareholders of the targeted corporation. The state acts were held preempted because the approach taken by each state struck a different balance from that provided in the federal statute. Significantly, each state's approach sought to protect only one set of identified interests, in place of the federal act's careful neutrality among the competing interests. By imposing additional requirements, the states upset the careful balance struck by Congress in providing investor protection. As Mr. Justice White noted in *Mite*: "The state thus offers investor protection at the

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2. When the *Mite* case reached this Court, Mr. Justice White found the state act to be preempted, but the other Justices found it unnecessary to reach the question.

expense of investor autonomy—an approach quite in conflict with that adopted by Congress". *Edgar* v. *Mite Corp.*, ... U.S. ....., 102 S. Ct. 2629, 2640 (1982) (White, J.).

The Federal Fair Practices Act presents an even stronger case for preemption than the Williams Act, because it expressly provides protection for the rights of more than one competing group. Moreover, the Williams Act does not include the equivalent of a Section 2304 to protect a tender offeror's rights, or a Section 2303 to protect investor autonomy. Rather, the Williams Act only prescribes the method by which Congress intended to protect one group. Yet, in view of the Act's limited scope and its legislative history, the federal courts have determined that the Williams Act set forth a "balance" of competing interests, which prevails over state laws that alter the balance.

Under the Federal Fair Practices Act, Congress adopted a distinctly different approach to protecting a farmer's right to join a cooperative than the Michigan Act. In the Federal Act, Congress expressed its intent to permit farmers and handlers to make their own decision regarding collective bargaining, free from any discrimination. Moreover, the Federal Fair Practices Act affirmatively recognizes and protects conflicting interests of both farmers who wish to remain independent of an association, and those who wish to join a cooperative association. It is impossible to read the Senate Committee Report without concluding that Congress intended to strike a careful balance among all competing interests. Senate Report 474, *supra* p. 13.

By ignoring these principles, the Michigan Supreme Court committed a basic error. The court determined that even if Congress sought to strike a balance among com-

peting private interests, *the states* were not thereby prohibited from readjusting the relationships between those groups (opinion, page A10). A state's attempt to restructure the balance struck by Congress is the very act that offends the Supremacy Clause and requires preemption of the state regulation. *Cf. Fidelity Federal Savings and Loan Association* v. *De La Cuesta*, ... U.S. ....., 102 S. Ct. 3014 (1982) (state law that rearranged private contract rights of mortgagor and mortgagee is invalid because contrary to federal regulation).

C. A Finding Of Preemption Is Also Required Because It Is Physically Impossible To Fully Comply With Both The Federal And State Statutes.

The Michigan Supreme Court recognized that where it is physically impossible to simultaneously comply with both federal and state laws, the Supremacy Clause strikes down the state law. However, the state court erroneously held that impossibility of compliance does not exist in this case, despite federal court rulings that the Federal Act requires conduct which would be a clear violation of the Michigan Act. *See Garrison* v. *Dairymen, Inc.*, Civ. Action No. 80-1080-3, slip op. (D.S.C. July 28, 1980); *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227 (N.D. Ohio 1974).

Garrison and *Butz* clearly held that the Federal Act *requires* a handler to negotiate with an individual farmer, regardless of whether he belongs to a cooperative association. In direct contrast, the Michigan Act *forbids* a handler from dealing with individual producers once an accredited association has been formed.

The state court dismissed *Garrison* and *Butz* as standing merely for the proposition that a handler may not coerce a producer. Yet, if a Michigan handler refuses to

bargain with a nonmember producer pursuant to state law, that farmer is thereby coerced into dealing with a cooperative. The handler certainly could not defend a federal lawsuit on the ground that his actions were sanctioned by state law. Therefore, the physical impossibility of simultaneous compliance with both the Federal Act and Michigan Act mandates invalidation of the conflicting state law.

II. THIS APPEAL MERITS PLENARY CONSIDERATION BY THE COURT.

The decision of the Michigan Supreme Court represents a serious narrowing of the provisions and effect of an Act of Congress. Unless reversed by this Court, the decision will be binding precedent in Michigan. A summary affirmance in this case will require all lower federal and state courts to give the Federal Act the same narrow interpretation accorded it by the Michigan Supreme Court. *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975); *see Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). An affirmance will have national impact, since several states have passed or are considering legislation patterned after the Michigan model. *E.g.*, N.Y. Agric. & Mkts. Law § 294 (McKinney Supp. 1982); H.B. 1144, 53d G.A., 2d Sess. (Colo. 1982); H.B. 2571, 1982 Sess. (Pa.); H.B. 499, 1981 Sess. (Pa.); S.B. 73, 1981 Sess. (Wis.).

It may be that the Michigan Supreme Court was correct in holding that Section 2303 created no right to refrain from joining an association, despite its use of those words; that numerous members of Congress were merely mistaken in thinking that they were protecting rights in Section 2304, which is meaningless surplusage; and that Congress really attempted to balance no competing inter-

ests in the Federal Act. Before subscribing to such a restrictive view of an Act of Congress, this Court should give the question full consideration.

RELIEF REQUESTED

Appellants pray that this Court note its probable jurisdiction over this appeal; that, after plenary consideration, it declare the challenged provisions of Sections 4, 10 and 13 of the Michigan Act to be in conflict with the Federal Act and therefore unconstitutional; and that the contrary judgment of the Michigan Supreme Court be reversed.

Respectfully submitted,

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Dated: March 22, 1983

APPENDIX

1. OPINION OF MICHIGAN SUPREME COURT, FILED DECEMBER 23, 1982, DELIVERED UPON RENDERING FINAL JUDGMENT

STATE OF MICHIGAN
SUPREME COURT

No. 56434

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs-Appellants,

v

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants-Appellees.

BEFORE THE ENTIRE BENCH (except Riley, J.).

RYAN, J.

This is the second time this litigation has been before the Court.

In 1976, an opinion and supporting orders were issued remanding the case to the circuit court for the development of a record sufficient to permit consideration of the

plaintiffs' original challenge to the constitutionality of the Agricultural Marketing and Bargaining Act, MCL 290.701 *et seq.*; MSA 12.94(101) *et seq.* (hereinafter the AMABA or the Michigan act), and determination of the applicability of the Administrative Procedures Act, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*[1] The somewhat unique procedural history detailed in the 1976 opinion brought the case before the Court without the development of a factual record necessary for resolution of some of the substantive challenges then presented. We retained jurisdiction, and the parties, having complied with our prior orders, are before the Court once again.

Plaintiffs include Michigan Canners and Freezers Association, an organization of "handlers"[2] of "agricultural commodities",[3] individual handlers, an incorporated "pro-

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1. See *Michigan Canners & Freezers Ass'n, Inc* v *Agricultural Marketing & Bargaining Board*, 397 Mich 337; 245 NW2d 1 (1976).

2. MCL 290.702(g); MSA 12.94(102)(g).

"(g) 'Handler' means a person other than an association engaged in the business or practice of acquiring agricultural commodities from producers or associations for processing or sale; grading, packaging, handling, storing or processing agricultural commodities received from producers or associations; contracting or negotiating contracts or other arrangements, written or oral, with producers or associations with respect to the production of any agricultural commodity; or acting as an agent or broker for a handler in the performance of any function or act specified above. It does not include a producer who sells at a retail establishment which he owns and operates or who sells directly to consumers at a produce market, agricultural commodities produced by him and agricultural commodities produced by another producer subject to value limitation established by the board."

3. MCL 290.702(f); MSA 12.94(102)(f).

"(f) 'Agricultural commodity' means all perishable fruits and vegetables as defined by the board. The kinds, types and subtypes of products to be classed together as an agricultural commodity for the purposes of this act shall be determined by the board on the basis of common usage and practice."

ducer",[4] and an individual "producer". They have challenged AMABA on three constitutional grounds:

1) The Michigan act conflicts with and is, therefore, pre-empted by the Federal Agricultural Fair Practices Act of 1967, 7 USC 2301 *et seq.* (hereinafter FAFPA or the federal act);

2) The Michigan act is facially unconstitutional because it exceeds the state's police power; and

3) The Michigan act's provisions exceed the scope of its title in violation of the Michigan Constitution.[5]

In addition, plaintiffs contend that the Administrative Procedures Act of 1969, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.* (hereinafter the APA), is applicable to AMABA and that the defendant Agricultural Marketing and Bargaining Board failed to comply with the requirements of the APA in accepting and accrediting the Michigan Asparagus Growers Division of defendant Michigan Agricultural Cooperative Marketing Association (MACMA) as the bargaining representative of the Processing Asparagus Bargaining Unit. We address the issues in the order raised.

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4. MCL 290.702(e); MSA 12.94(102)(e).

"(e) 'Producer' means any person who produces or causes to be produced in any 1 marketing period within the previous 2 marketing periods, any agricultural commodity in quantity beyond his own family use and having a minimum value at first point of sale as determined by the board for that agricultural commodity, and who is able to, during the marketing period transfer to a handler or an association a merchantable title to the agricultural commodity or provide management, labor, machinery, facilities or any other production input, with the assumption of risk, for the production of the agricultural commodity under a written or oral contract."

5. "No law shall embrace more than one object, which shall be expressed in its title." Const 1963, art 4, § 24.

I

The United States Congress and the Michigan Legislature have each passed legislation to protect a farmer's right to join a cooperative association and to bargain collectively through that association. It is not disputed that FAFPA and AMABA share at least this one common goal. Nevertheless, plaintiffs argue that the scheme chosen by the Michigan Legislature to carry out that purpose conflicts totally with that chosen by Congress and thus pursuant to the supremacy clause contained in art VI of the United States Constitution,[6] the Michigan legislation is "pre-empted".

In interpreting and applying the supremacy clause in the context of competing state and federal legislation, the United States Supreme Court has developed two lines of analysis to describe situations in which federal legislation has pre-empted state lawmaking on the subject in question.

The first is so-called "field pre-emption" in which any state legislation, harmonious or otherwise, is invalid if it seeks to regulate in any area in which Congress has intended to completely occupy the field. See *Rice v Santa Fe Elevator Corp*, 331 US 218; 67 S Ct 1146; 91 L Ed 1447 (1947).

The second type of pre-emption is called "conflict pre-emption" and exists in circumstances in which a state regulation is invalid under the supremacy clause, even though Congress has not fully foreclosed state legislation in a particular area, because the state regulation is held to be in conflict with the federal regulation. The two-

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6. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." US Const, art VI.

prong test to determine if a conflict pre-emption exists was most clearly articulated in *Ray* v *Atlantic Richfield Co*, 435 US 151, 158; 98 S Ct 988; 55 L Ed 2d 179 (1978):

> "A conflict will be found 'where compliance with both federal and state regulations is a physical impossibility' * * * or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "

The parties agree that this is not a case of field pre-emption since the federal act itself, § 2305(d), states that "existing State law" shall not be changed or modified by the federal act. Thus, it is clear that Congress did not intend to foreclose state regulation of agricultural marketing. We note, however, that § 2305(d) is not enough in itself to resolve the dispute in defendants' favor, since the Michigan act was not passed by the Legislature until 1972, four years after the federal act.

Instead, plaintiffs have framed their challenge to the AMABA in conflict pre-emption terms, asserting both that AMABA stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and that "compliance with both federal and state regulations is a physical impossibility". We disagree.

A

Concededly, the FAFPA and the AMABA seek to accomplish the same *general* purpose: to permit producers (farmers) to associate together in a marketing cooperative to enable them to improve their marketing and bargaining position when dealing with food handlers (processors).[7] The primary distinction between the two

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7. For ease of reference, we use the terms handler and processor interchangeably in this opinion although, in a way not germane to our disposition of the issues, there is a technical difference between the two.

regulatory schemes is AMABA's requirement that once an association of producers is accredited by the Agricultural Marketing and Bargaining Board,[8] that association becomes the exclusive sales representative for all producers in the bargaining unit, regardless of membership in the association.[9] Those producers in the bargaining unit who do not join the association are, nevertheless, bound, when dealing separately and individually with a handler, by all terms and conditions of the contract negotiated with handlers and must assist in supporting the association by paying a service fee.[10] Even an association member who chooses to deal with a handler individually, as indeed he may, is likewise bound by the terms of the association's bargain with a handler of the same commodity.

Once an association is accredited, AMABA makes it unlawful for handlers "[t]o refuse to bargain with an accredited association with whom the handler has had prior dealings or with an accredited association whose producers in the bargaining units have had substantial dealing with the handler prior to the accreditation of the association", or "[t]o negotiate with a producer included in the bargaining unit after an association is accredited."[11]

A prerequisite to accreditation is that the association seeking accreditation must have "marketing and bargaining contracts for the current or next marketing period with more than 50% of the producers of an agricultural commodity who are in the bargaining unit and these

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8. The board is created by the act. See MCL 290.703; MSA 12.94(103).

9. MCL 290.710, 290.713; MSA 12.94(110), 12.94(113).

10. MCL 290.710(1); MSA 12.94(110)(1).

11. MCL 290.704(1), subds (g), (h); MSA 12.94(104)(1), subds (g), (h).

contracts cover more than 50% of the quantity of that commodity produced by producers in the bargaining unit".[12] Put differently, before an association becomes the exclusive sales representative of all producers, there must not only be a majority of such producers in favor of, and voting for, such representation, but those producers must also produce a majority of the quantity of the commodity involved.

In contrast to AMABA, FAFPA lacks any such exclusive representation provisions. Instead, FAFPA specifically disavows any attempt to regulate in such a manner:

> "Disclaimer of intention to prohibit normal dealing
>
> "Nothing in this chapter [7 USC 2301 et seq.] shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers." 7 USC 2304.

Plaintiffs claim that this provision should be read either as the affirmative creation of a *processor's* right to deal with the individual farmer of his choice, or the affirmative protection of such a right. It is, in plaintiffs' view, a provision representing a careful balance struck by Congress only after consideration of the conflicting interests of individual producers, processors, and associations. Citing *Jones* v *Rath Packing Co*, 430 US 519; 97 S Ct 1305; 51 L Ed 2d 604 (1977), plaintiffs argue that despite the fact that the Michigan and federal acts share a common general purpose, the method of regulation chosen by Michigan upsets "the balance struck by Congress" and AMABA must, therefore, fall.

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12. MCL 290.707(c); MSA 12.94(107)(c).

Were we to agree that § 2304, or any provision in FAFPA, was meant to affirmatively *create* or *protect* rights of private dealing between individual producers and processors, we would agree that AMABA must fall because, plainly, AMABA conflicts with that result. However, we do not find such meaning in the provisions of the federal act.

The language of § 2304 does not justify the meaning plaintiffs assign to it. The disclaimer provision, rather than having an operative effect, is essentially explanatory, beginning as it does with the phrase "[n]othing in this chapter", referring to the substantive and affirmative provisions of FAFPA. It neither requires nor prevents bargaining between handlers and individual producers or associations of producers. We do not discern from a provision termed a "disclaimer of intention" a positive congressional intent to prohibit the conduct said not to be regulated. There is no logical nexus between a provision declaring "this is what we did not do" and the conclusion that "what we did not do, cannot therefore be done". Section 2304 is nothing more than an explanation of what FAFPA was not intended to do. It did not, in disclaiming any "Intention to prohibit normal dealing", thereby create or affirmatively protect an individual handler's right to bargain with any producer, or an individual producer's right to bargain for himself. It is simply, aside from the disclaimer neutral on *that* point. Section 2304 cannot fairly be read as a statement of congressional intent to prohibit exclusive bargaining by producer associations. It is simply a statement indicating that *FAFPA* did not promulgate an exclusive bargaining system for marketing a producer's agricultural commodity.

This interpretation of § 2304 is bolstered as well by the announced congressional finding and declaration of policy contained in § 2301:

"Agricultural products are produced in the United States by many individual farmers and ranchers scattered throughout the various States of the Nation. Such products in fresh or processed form move in large part in the channels of interstate and foreign commerce, and such products which do not move in these channels directly burden or affect interstate commerce. The efficient production and marketing of agricultural products by farmers and ranchers is of vital concern to their welfare and to the general economy of the Nation. Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law. Interference with this right is contrary to the public interest and adversely affects the free and orderly flow of goods in interstate and foreign commerce.

"It is, therefore, declared to be the policy of Congress and the purpose of this chapter to establish standards of fair practices required of handlers in their dealings in agricultural products."

Nothing in this broadly drawn provision suggests a congressional intent to affirmatively *protect* producers from exclusive representation or to affirmatively grant new or protect pre-existing rights to deal freely. Instead, the above-quoted language simply demonstrates a congressional intent to protect producers from handler coercion.

Section 2303, which specifically details the practices prohibited, begins:

"It shall be unlawful *for any handler* knowingly to engage or permit [engagement] * * * in the following practices:

"(a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association; or

"(b) To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers". (Emphasis added.)

FAFPA's prohibitions are specifically directed toward regulating *handler* misconduct. Subsection (a) does not afford an absolute right to a producer to deal directly with a handler. It merely protects a producer from being unduly influenced *by a handler* in deciding whether or not to join a cooperative marketing association. While § 2303 makes it unlawful for a handler to coerce a producer to "join and belong to" an assocation, it does not forbid a *state* from requiring exclusive representation of individual producers where a producer majority sees fit.[13]

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13. The parties have argued at length over whether there is any meaningful distinction between being required to *join* an association and merely being required to support and be represented by an association as required by AMABA. Analogies are drawn from the field of labor law and the development of the legal consequences of "agency" versus "union" shop contract clauses.

Though we believe there is such a distinction, see *Abood* v *Detroit Board of Education*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), its relevance in the pre-emption contest is lacking. The aim of FAFPA is to prevent *handler* coercion. It does not speak to producer protection from all sources of coercion. Even if AMABA were read to require a producer to *join* an association, the coercion would be the product of state action not handler action. Though there undoubtedly would be First Amendment implications, under such circumstances there would still be no conflict between FAFPA and AMABA.

All FAFPA meant to accomplish was to restrain certain types of coercive handler conduct. While § 2303 details the prohibitions, § 2304 makes clear, by way of explanation, the limited scope of those prohibitions. Nowhere in FAFPA is there an attempt to protect or create a positive right to deal with whomever a handler or producer wishes.

Our interpretation of FAFPA in general, and § 2304 in particular, is amply supported by the legislative history of the act. The report of the Secretary of Agriculture to the Senate Committee on Agriculture and Forestry in recommending passage of FAFPA states:

> "Cooperative action in agricultural production and marketing is increasing. It is growing in response to the need, (1) to achieve more orderliness and efficiency in production and marketing, and (2) to protect and improve bargaining relationships between producers and marketing firms in the face of major changes taking place in the marketing system.
>
> "These changes include the growing integration of production and marketing of agricultural products, the increased control of those functions by large, diversified corporations, and the expanded use of contracting by such corporations to meet their needs. Developments such as these weaken the marketing and bargaining position of individual producers.
>
> "It is essential to protect the rights of producers to join together in cooperatives to perform necessary marketing operations, including bargaining with processors and other buyers over the terms of sale of the producers' farm products. Cooperative bargaining has come into prominence as the old market system is being displaced by contractual arrangements in the

production and marketing of agricultural products. We believe these trends will continue.

"The proposed bill would materially strengthen farmers' ability to bargain and market effectively. It will reaffirm the right of producers to join together and operate cooperatives without interference. It will remove some of the impediments confronting producers in organizing and operating their cooperative associations.

"Producers have suffered harassment and reprisal by some processors because of activity in organizing and joining a cooperative. Grower contracts have been canceled or reduced in volume. Processors have offered inducements to growers not to join a cooperative. Attempts have been made to buy off the cooperative's leaders to create dissention in the organization.

"Processors operating in several production areas have coerced growers desiring to form a bargaining cooperative by threatening to leave the cooperative's territory and expand operations elsewhere. Growers have failed to get redress after such questionable processor actions.

"If this bill were enacted, many producers who fear harassment or discrimination would feel free to join a cooperative association. It would help producers use cooperatives as a more effective tool in marketing their products." 1968 US Code Cong & Ad News, p 1875.

Clearly, in the secretary's view, the FAFPA was aimed at enhancing producer bargaining power, not at creating or protecting rights to deal individually.

That intent is reflected as well in the committee report on § 2304:

> "Section 5[§ 2304] disclaims any intent to prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in an association of producers, or to prevent handlers and producers from dealing with one another individually on a direct basis, or to require a handler to deal with an association of producers. The bill does not prevent or require these actions and is not intended to do so. While the proponents of the bill stated in their testimony that this was not the purpose, there was some concern, especially on the part of processors and other purchasers of agricultural products, that the bill in fact went further than intended. The committee felt that a clear statement in the bill itself would be helpful to courts, handlers, associations, producers, and others in their construction of this legislation; and has recommended inclusion of this section in the bill.
>
> "There are many good, sound economic reasons for handlers and producers to select customers and suppliers. The bill does not attempt to prevent these sound reasons from operating.
>
> "While the bill does not prevent handlers and producers from dealing with one another individually on a direct basis, it does prevent handlers from exerting any improper pressure in an effort to weaken associations or discourage membership. While the bill does not require a handler to deal with an association of producers, it certainly makes clear that farmers have a right to form such associations and should be protected in the exercise of this right. The fact is clear that an association of producers which

> has obtained the voluntary membership of a large number of farmers deserves respect and recognition by the handler of agricultural products." HR Rep No 824, S Rep No 474, 90th Cong 2d Sess, reprinted in 1968 US Code Cong & Ad News, pp 1867, 1873.

Section 2304's disclaimer of any congressional intent to affect pre-existing freedom to deal individually cannot be read as a creation of new rights or an express new statutory protection of old rights; nor can it be read as precluding a state from choosing to adjust pre-existing freedom to deal.

Given our interpretation of FAFPA, we cannot see how AMABA "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". As we have indicated, congressional intent was directed at improving the bargaining position of individual producers by protecting them from handler coercion in their choice to join a cooperative marketing association. We discern no intent on the part of Congress, as plaintiffs assert, to affirmatively "strike a balance" among competing interests, including protecting a handler's right to deal directly with a producer or vice versa. In our view, the provisions of AMABA affording exclusive representation to a producers' cooperative created by a majority of the producers of a particular commodity, and the requirement of service fees, was a step by the Michigan Legislature into a previously unregulated area; a step which furthers both the goals of FAFPA and others not prevented by FAFPA by taking an active role in enhancing the bargaining position of producers, protecting not only individuals, but also their associations from internal and external pressures.

FAFPA's producer protections only indirectly affect cooperative associations as associations. Its principal pur-

pose is to insulate individual producer choice from handler coercion. AMABA duplicates these individual protections, but goes further to recognize and insure the *association's* continued right to exist as a separate entity. AMABA's exclusive representation provisions insulate the association from handler attacks on its membership by eliminating the possibility of "sweetheart" offers made to non-association producers, but not to the association's membership. Without doubt, if the purpose of a "sweetheart" offer made to one producer is to coerce another in his choice of association membership, then the handler would be in violation of § 2303(a) of FAFPA. The obvious difficulty in proving such indirect coercion, especially since the justification for a superior offer may rest upon an array of ostensibly sound but often subjective economic factors such as a handler's assessment of quality, is eliminated under an exclusive representation system.

Similarly, AMABA's service fee provisions protect the association's integrity by eliminating the incentive for a producer to be a "free rider", accepting the benefits of association representation without assisting in its cost.[14]

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14. In his opinion, Circuit Judge Thomas Brown specifically found:

> "The problems of the 'free rider' (a non-member who enjoys the co-op price without belonging or paying) and the 'sweetheart contract' (a device engaged in by processors to erode the power of the voluntary co-operative) will both be made obsolete by the provisions of the act."

His finding that these problems existed prior to AMABA's enactment is amply supported in the record by the testimony of witnesses John Handy, producer and organizer of the Great Lakes Cherry Producers Marketing Cooperative, a voluntary marketing association in existence from 1957 to 1967; Dr. James Schaffer, professor of agricultural economics at Michigan State University and a participant in the drafting of AMABA; George Stover, owner and operator of a 700-acre farm; and Noel Stuckman, who was the General Manager of MACMA and an MACMA employee since November, 1971.

Though Congress disavowed the creation of a mini-Wagner Act to accomplish its purpose, nothing in FAFPA can be construed as preventing Michigan from adopting such an approach to accomplish a broader purpose though one inclusive of the federal purpose and one which, in fact, furthers the desire of Congress "to establish standards of fair practices required of handlers in their dealings in agricultural products". 7 USC 2301.

B

Plaintiffs also assert that compliance with both FAFPA and AMABA is physically impossible and thus, under the second prong of conflict pre-emption analysis, the Michigan act must fall. The basis of plaintiffs' claim is its view that *Butz* v *Lawson Milk Co*, 386 F Supp 227 (ND Ohio, 1974) and *Garrison* v *Dairymen*, Civil Action No. 80-1080-3 (D SC, 1980) (Slip Op) interpreted FAFPA to *require* what AMABA forbids, *viz.*: that a handler deal with a producer if the producer so desires. That position is simply incorrect. Such an interpretation of FAFPA would, on its face, conflict with what § 2304 says about the act. Though both courts found handlers in violation, or probably in violation, of FAFPA, it was because the handler's refusal to deal with the producers involved had a coercive effect on the producers' choice of whether to join an association.

In *Butz*, a handler refused to deal with a producer who had assigned to a producer association the exclusive right to sell his milk. In *Garrison*, producers of milk sought an injunction against a handler who refused to accept their milk unless they joined an association of milk producers. In both cases the courts' decisions were directed toward preventing *handler* coercion. Nothing in either case can be fairly read to suggest that the *state*

requirement of exclusive association representation of all unit members makes it physically impossible to comply with both acts.

Association representation, or non-representation, under the Michigan act may not be coerced by a handler just as is it may not under FAFPA. Simply because the State of Michigan has required under AMABA what a handler cannot require under either AMABA or FAFPA does not render compliance with the two acts physically impossible. The producer protection afforded under FAFPA was a protection against handler abuse. Those same protections, and the resulting conduct required of handlers, are afforded by AMABA. Indeed, the protections afforded by § 2303 of FAFPA are virtually identical with those of § 4 of AMABA. Though AMABA regulates more extensively than FAFPA, it substantially duplicates FAFPA's prohibitions on handler conduct. Since the identical prohibitions are placed on handler conduct, and since AMABA's additional provisions pertain only to producers, an area left unregulated by FAFPA, we perceive no physical impossibility of compliance with both acts.

For the foregoing reasons, we find no pre-emption of AMABA by FAFPA.

II

Plaintiffs' second constitutional attack focuses on a claimed violation of their due process rights[15] on the

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15. Article I, § 17, of the Michigan Constitution provides that: "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law". Similarly, the 14th Amendment to the United States Constitution provides that "* * * [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

theory that AMABA is an illegitimate exercise of the state's police power.

The applicable test for determining whether a legislative enactment is a legitimate exercise of the state's police power consistent with due process requirements is twofold: a) does it address a proper public purpose, and b) is the remedy adopted reasonably related to the stated public purpose? *Michigan Canners & Freezers Ass'n, Inc* v *Agricultural Marketing & Bargaining Board*, 397 Mich 337, 343-344; 245 NW2d 1 (1976). A successful constitutional challenge to a legislative enactment on police power grounds requires

> "the party challenging the act [to carry] the burden of overcoming the presumption of constitutionality which accrues to the statute. *Irishman's Lot, Inc* v *Secretary of State*, 338 Mich 662, 667; 62 NW2d 668 (1954); *Thayer* v *Dep't of Agriculture*, 323 Mich 403, 410; 35 NW2d 360 (1949). To overcome this presumption, plaintiff must show either that there is no public purpose to be served by the statute, or that there is no reasonable relationship between the remedy adopted by the Legislature and the public purpose. *Grocers Dairy Co* v *Dep't of Agriculture*, 377 Mich 71, 75; 138 NW2d 767 (1966); *Carolene Products Co* v *Thomson*, 276 Mich 172, 178; 267 NW 608 (1936)."

In *Shavers* v *Attorney General*, 402 Mich 554, 613, 614; 267 NW2d 72 (1978), we announced that what

> "this 'presumption of constitutionality' means, in terms of challenged police power legislation, is that in the face of a due process or equal protection challenge, 'where the legislative judgment is drawn in question', a court's inquiry 'must be restricted to the

> issue whether any state of facts either known or which could reasonably be assumed affords support for it'. *United States* v *Carolene Products Co,* 304 US 144, 154; 58 S Ct 778; 82 L Ed 1234 (1938). A corollary to this rule is that where the legislative judgment *is supported by 'any state of facts either known or which could reasonably be assumed',* although such facts may be 'debatable', the legislative judgment must be accepted. *Carolene Products Co* v *Thomson,* 276 Mich 172, 178; 267 NW 608 (1936)."

We went on in *Shavers,* p 617, relying on our preliminary disposition in this case, to demonstrate that when challenged police power legislation is "important, complicated, novel or experimental legislation", there may be a need to conduct a trial to establish facts necessary to evaluate the challenge. Because of the remand of this case to the circuit court and the proceeding conducted there, such fact development has now occurred. Our task is now the same as it was in *Shavers,* p 618.

> "First, we must determine from the record before us whether plaintiffs have overcome the presumption of constitutionality by showing facts which reveal that the legislative judgment is without rational basis, or, to the same effect, we must determine from the record whether the challenged legislative judgment is supported by *any* reasonable state of facts justifying its enactment. Second, we must then determine whether the legislative response bears a reasonable relation to this identified objective."

Plaintiffs claim that AMABA is designed simply to promote higher prices and upgrade the economic position of producers vis-a-vis handlers, a purpose they characterize as establishing "price security", and one not subsumed

within the purposes of legitimate legislative regulation.[16] Having so defined and limited the purposes of AMABA, plaintiffs argue by analogy to *Shakespeare Co* v *Lippman's Tool Shop Sporting Goods Co*, 334 Mich 109; 54 NW2d 268 (1952), that AMABA must be struck down as an unconstitutional attempt to establish price security, an endeavor directed at disruption of the operation of a free market and thus inconsistent with the public interest.[17] The error in attempting to analogize to *Shakespeare* is inevitable in light of plaintiffs' initial premise that AMABA is aimed at price security and as such is an unnecessary and, because it disrupts the operation of a free healthy market, an unconstitutional intrusion into private enterprise.

Our reading of the act, examination of the circuit judge's opinion and review of the record lead us to con-

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16. In plaintiffs-appellants' brief in this Court, they argue:

"[T]he act is absolutely barren of any ostensible relationship to a valid police power objective. It lacks any indication that it is necessary for the preservation of public health, safety, morals or general welfare, or to prevent fraud. It is not designed as a sanitary measure, or as a method by which impure foods are kept from the tables of the consuming public. Instead, the act attempts to promote price and upgrade the economic position of producers vis-a-vis handlers. This avowed public purpose is constitutionally infirm, since the courts have consistently rejected the concept of price security as a proper basis for the use of the state's police power. *Baldwin* v *Seelig*, 294 US 511; 55 S Ct 497; 79 L Ed 1032 (1935); *Van Winkle* v *Fred Meyer, Inc*, 151 Or 455, 471; 49 P2d 1140, 1146 (1935); *People* v *Kuc*, 272 NY 72; 4 NE2d 939 (1936); *Good Humor Corp* v *City of New York*, 33 NYS2d 905 (S Ct, 1942), *aff'd* 264 AD 620; 36 NYS2d 85 (1942), *aff'd* 290 NY 312; 49 NE2d 153 (1943)."

17. According to plaintiff, *Shakespeare* stands for the proposition that legislation authorizing the vicarious binding of independent businessmen by transactions to which they have not consented exceeds the state's police power. Appellants' brief at 47-48. This is an excessively broad reading of *Shakespeare* and does not withstand scrutiny. The fair trade laws struck down in *Shakespeare* were invalidated because they had nothing to do with a public purpose.

clude that AMABA was not directed toward achieving price security for producers at the expense of the operation of a free market, but was, instead, only intended to overcome an artificial obstacle to the operation of supply and demand forces, *viz.*, the fortuitous position of handlers of perishable agricultural products in the chain of marketing such commodities which permitted handlers to distort free market forces by demanding prices not wholly reflective of supply and demand. AMABA is not a price-fixing act, nor is it intended to allow association control of the output of individual farmers. It is, rather, an enabling act which seeks solely to promote the equalization of bargaining power between producers and processors of perishable products.

The circuit court found as facts that the following conditions existed prior to AMABA's enactment:

a) Growers faced the problem of disposing of extremely perishable fruits and vegetables with a corresponding lack of freezing and/or storage facilities.

b) There existed large numbers of unorganized growers who, when aligned against a concentration of processors, could not individually affect the price paid for their product by processors.

c) The market lacked an extensive number of processors and the growers lacked ability to transport perishable goods any distance.

d) Processors were reluctant to recognize voluntary grower cooperative bargaining associations.

e) Processors were known by growers to discriminate against persons who belonged to cooperative bargaining associations.

f) It was difficult to develop and maintain voluntary bargaining associations because some persons obtained a "free ride" (*i.e.*, accepted the benefits of cooperative bargaining without assisting in its cost).

g) There existed a "take it or leave it" pricing policy with no authority in the fieldmen of the processors to negotiate price.

h) The processor possessed the resources to obtain superior marketing knowledge, while the grower lacked time to obtain or digest information.

i) Any effective producer association would require statewide organization with emphasis on particular products.

j) Growers sometimes engaged in picketing of processors and withholding perishable goods because of unsatisfactory prices.

k) It was difficult to coordinate production and marketing decisions so as to reduce spoilage. Processor failure to announce a price early in the marketing season sometimes led to the withholding of harvested commodities until some spoilage had occurred.

l) Prices received by farmers fluctuated greatly.

m) Supply and demand did play a role in affecting pricing decisions.

All of these findings are amply supported by the record. Taken as a whole, they establish a disparity in bargaining power resulting in disruption of the orderly marketing of perishable agricultural commodities and the imposition of inequitable economic pressure upon independent producers.

Whatever economic advantage plaintiff processors enjoyed prior to AMABA, and lost because of it, was not

so much the result of astute investment of labor or capital as it was the sheer nature of agricultural marketing and the processors' superior position of power in the chain necessary to bring a commodity to the consumer. To the extent bargaining power is equalized, the assumptions of economic theory are validated and the operation of a free market is enhanced. Nothing in AMABA inhibits more producers or processors from entering the market. Nothing in AMABA dictates the price at which agricultural products must be sold or how producers or processors should conduct their business except when it comes time to deal with each other. Thus, the act operates to free the market forces of supply and demand to overcome the artificial price-setting power otherwise vested in processors.[18]

We are confident that legislation designed to enable the producers of agricultural commodities representing more than 27% of the value of this state's annual agricultural yield[19] to better protect themselves from the unfair

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18. Presumably cooperative associations will not find it in their best interests to bargain for excessive prices since processors are free to abandon Michigan producers altogether and fill their needs outside the state. Furthermore, in the event that both parties are unable to agree on a price, yet wish to deal, the dispute will be settled by arbitration. MCL 290.716; MSA 12.94(116).

At least in theory the parties will be engaged in negotiations that will result in a price reflective of the supply available and the demand among consumers for that product. Furthermore, because the relationship between agricultural producers and processors tends to extend over the long run, it will be in the producers' interests to moderate demands when supply is short in exchange for a reasonable price when supply is abundant. Such a moderation should lead to price stability beyond that afforded by exclusive representation and thus to even more efficient planning.

19. This figure is drawn from the testimony and exhibits of Dr. Lawrence Van Mier who was, at the time of his testimony, Director of the Division of Economics and Statistics of the National Canners Association. It is based on volume and value averages for the years 1968 through 1972.

imposition of prices by processors and thereby to improve and insure the production and marketing of perishable fruits and vegetables is within the historically viewed ambit of a legitimate legislative purpose. See *Cady* v *Detroit*, 289 Mich 499; 286 NW 805 (1939).

B

Having concluded that the legislative purpose behind AMABA was to equalize bargaining power between a relatively small number of processors and a large number of producers, thereby eliminating both the potential for economically rational, but unfairly abusive, price-setting by processors and the potential for disrupting the marketing of perishable agricultural products, and having found these purposes to be in the interests of the public welfare, we also find AMABA's provisions reasonably related to those purposes. We find a sufficient and rational relationship between those provisions in AMABA enabling producers to bargain collectively, those protecting producer associations from being weakened through sweetheart deals and free-riders by providing for exclusive representation and service fees, and those providing for compulsory arbitration for resolving impasses with respect to terms subject to bargaining on the one hand, and the Legislature's intent to equalize bargaining power and thereby ensure orderly marketing of perishable, agricultural commodities on the other. We agree with the circuit court that this "act solves some problems [and] creates others" but, on the whole, as demonstrated by competent evidence, it is "reasonably related to the problems perceived by the Legislature and is a reasonable attempt to solve at least some of the problems". We add that the difficulty in assessing whether these goals have yet been achieved does not diminish their legitimacy; "it is precisely because regulation in the economic field

often deals with long-term developments that the Court treats such legislation with great deference." *Shavers* p 629. We find AMABA constitutional on its face.

III

Plaintiffs also argue that the subject matter of AMABA exceeds the scope of its title in violation of Const 1963, art 4, § 24, mandating that "[n]o law shall embrace more than one object, which shall be expressed in its title". The title of AMABA states:

> "An act to permit producers of agriculture commodities to be represented by associations; to create an agricultural marketing and bargaining board; to provide for the accreditation of associations; to establish obligations on the part of handlers and associations; to provide for arbitration; to define unfair practices; and to prescribe penalties."

Plaintiffs assert that since the substance of AMABA *compels* association representation of producers once a majority wants such representation and since the title speaks only to *permitting* such representation, the act exceeds its title in this respect and must be invalidated accordingly.

Plaintiffs' argument is not well taken. "The title need not serve as an index; it is sufficient if it fairly expresses the subject of the legislation and conveys comprehension of its germane provisions". *Krench* v *Michigan*, 277 Mich 168, 175; 269 NW 131 (1936). The title accomplishes that task in this case. AMABA does not, in the first instance, *require* producer representation by association. Instead, it provides for a mechanism permitting producers to organize themselves and then, only when a majority agrees, the system operates to sweep even the

reluctant producer into the association's sphere of authority. The act enables self-motivated producers who want to be represented by an association to undertake to accomplish that task without fear of reprisal by handlers. It is in this sense that AMABA permits producers to be represented by associations. The compulsory aspect of AMABA is secondary but very much germane to its primary permissive-enabling function in that exclusive representation is an additional safeguard to the majority wanting representation by association. In a very real sense requiring representation of the minority permits representation of the majority.

While the Legislature may have more accurately reflected the scope of the act by substituting the phrase "provide for" for "permit" in the title and thereby steer a more neutral course between the elements of permissiveness and compulsion, both part of the act, we do not believe the title, as it stands, promotes deceit or subterfuge or fails adequately to assess the contents of AMABA. In adhering to Justice Cooley's admonition that our constitutional title-object provision "be construed reasonably, and not in so narrow and technical a sense as unnecessarily to embarrass legislation", *Ryerson* v *Utley*, 16 Mich 269, 277 (1868), we do not find that the substantive provisions of AMABA exceed the scope of its title.

IV

Plaintiffs' final contention is that the Administrative Procedures Act of 1969, MCL 24.201 *et seq.*; MSA 3.560 (101) *et seq.*, is applicable to the accreditation proceedings of the AMABA. In our 1976 remand of this case to the trial court, we indicated that the circuit judge could render an opinion as to the APA's applicability to board accreditation procedures, but was foreclosed from issuing

a dispositive order on the question since original jurisdiction over substantive challenges to such board determinations (orders)[20] is vested in the Court of Appeals, pursuant to MCL 290.705(2); MSA 12.94(105)(2). As a practical matter, what we ordered the circuit judge to do was to assist us in issuing a declaratory judgment. He has done so, concluding that accreditation proceedings under AMABA are "contested cases" within the meaning of § 3(3) of the APA, MCL 24.203(3); MSA 3.560(103)(3), and therefore subject to the procedural safeguards of the APA. We agree with that assessment and so hold.

Section 3(3) of the APA provides:

> "'Contested case' means a proceeding • • • in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing."

Association accreditation requirements and procedures are set forth in §§ 7, 8, 9 and 10 of AMABA.[21] Section 7 establishes the minimum standards an association must meet to qualify for accreditation. Sections 8, 9 and 10 discuss the mechanics of the process. Section 8(1) provides:

> "An association desiring accreditation shall file with the board a written request for accreditation in the form as required by the board. The request shall contain properly certified evidence that the association meets the standards for accreditation and shall

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20. In our earlier opinion, we decided that an accreditation determination is an order within the meaning of § 5(2) of AMABA. *Michigan Canners & Freezers Ass'n, Inc v Agricultural Marketing & Bargaining Board*, 397 Mich 337; 245 NW2d 1 (1976).

21. MCL 290.707 through 290.710; MSA 12.94(107) through 12.94(110).

be accompanied by a report of the names and addresses of members, the name of each handler to whom the member delivered or contracted to deliver the agricultural commodity during the previous 2 marketing periods and the quantity delivered. A fee to cover the costs of the board in processing the request shall be established by rule and paid by the association when the request is filed."

Section 9 states:

"(1) Within 60 days following the date of filing with the board a request for accreditation by an association, the board shall determine whether the association shall be accredited. If the board determines that insufficient evidence was filed by the association, the board may permit the association to file an amended request for accreditation within 30 days following the determination and notification of the association.

"(2) Within 30 days following the board's preliminary finding that the association is to be accredited, the board shall hold a public hearing to obtain further evidence relevant to confirmation that the association is to be accredited. Producers of record involved in the bargaining unit shall be notified of the hearing by mail and publication in a newspaper of general circulation in the bargaining unit area at least 10 days prior to the date of the hearing."

Finally, § 10(1), (2) provides:

"(1) The board shall issue and publish its determination within 30 days after the close of the hearing. If the determination of the board is to accredit the association, the board shall include a preliminary declaration of accreditation in its determination. The

preliminary declaration of accreditation shall clearly state that the association shall represent all producers, members and nonmembers alike, who are in the bargaining unit and act as exclusive sales agents for the bargaining unit in negotiations with handlers. A producer covered in a declaration of accreditation may join the association and have full membership rights therein. Handlers shall deduct marketing service fees from the proceeds to be paid to producers for the agricultural commodity in the amount as determined by the association and forward the service fees promptly to the association. The fees shall be within guidelines determined by the board and shall be subject to review by the board upon petition by 15% of the affected producers.

"(2) The accreditation of the association by the board shall be effective 30 days after the publication of the preliminary declaration of accreditation. The board shall delay the accreditation of the association whenever it receives during the 30-day period a petition signed by at least 1/3 of the producers in the bargaining unit who produce at least 1/3 of the production of the agricultural commodity produced by the bargaining unit, exclusive of quantities contracted with processing cooperatives and produced by handlers, and requesting that the association should not be accredited. The board shall determine by a mail referendum of bargaining unit producers within 30 days following receipt of the petition if producers assent to the accreditation of the association. Producers in the bargaining unit shall be deemed to have assented to accreditation if more than 50% of the producers in the bargaining unit who produce more than 50% of the volume of the affected commodity assent to representation by the association."

These provisions establish that when an association files with the board[22] a request for accreditation and supporting documentation of compliance with § 7 requirements, the board has 60 days to evaluate the request and determine whether the supporting evidence sufficiently discloses compliance with § 7 requirements. Within 30 days following the board's finding of sufficient evidence to support the request, "the board shall hold a public hearing to obtain further evidence relevant to confirmation that the association *is to be accredited*". This plain language demonstrates that prior to a hearing, the board cannot make a final accreditation determination. The language of § 10 reinforces this conclusion, as it provides, "The board shall issue and publish its determination within 30 days *after the close of the hearing*". We therefore reject defendants' claim that the accreditation determination is actually made before the hearing and thus is not within the definition of a contested case.

To the contrary, we find, in the AMABA accreditation provisions, all the definitional elements of a contested case. The board is an "agency" since it is created by statute.[23] The proceedings before the board involve the determination of the duties, rights, and privileges of a named party, the association, to wit, the Michigan Asparagus Growers Division of MACMA. The rights, duties, or privileges involved are this association's authority to act and be recognized as the exclusive bargaining agent for all producers in the unit. Finally, the board's accreditation determination could be made only after an opportunity for an evidentiary hearing where presumably any

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22. The "board", as defined in MCL 290.702(d); MSA 12.94(102)(d), is the agricultural, marketing, and bargaining board created in MCL 290.703; MSA 12.94(103).

23. "'Agency' means a * * * board * * * created by * * * statute". MCL 24.203(2); MSA 3.560(103)(2).

producer who did not want to be represented by the association could challenge the evidence supporting the association's request for accreditation or make any other lawful challenge to the association's accreditation.

We cannot find, as defendants have, a legislative intent inherent in AMABA to foreclose application of the APA to AMABA's accreditation proceedings. The failure of AMABA to make specific reference to the APA in the accreditation provisions, while making specific reference to it in three other AMABA provisions,[24] does not, as defendants contend, require application of the maxim *expressio unius est exclusio alterius* and the conclusion that the Legislature did not intend the APA to apply to board accreditation. This is so because the APA defines its own applicability and is not dependent upon express legislative invocation. The applicability of the APA, absent an express exclusion, is governed by a determination whether the statutory agency action falls within the APA's purview. We have concluded, in the present context, that board accreditation proceedings are contested cases within the meaning of the APA. There being no express legislative statement in the AMABA excluding the APA's application, our inquiry is at an end. The APA is applicable.

We note that the parties have stipulated in this case that should this Court find the APA applicable to board accreditation proceedings, all parties will be adequately protected by a "prospective only" ruling. That is, they are in agreement that non-compliance with the APA need not void the accreditation of the Michigan Asparagus Growers Division of MACMA. We therefore do not consider

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24. See MCL 290.703(8); MSA 12.94(103)(8), MCL 290.704(3); MSA 12.94(104)(3), MCL 290.716(1); MSA 12.94(116)(1).

whether, as a policy matter, it would have been prudent or proper for this Court to determine if, in fact, the procedures followed by the board in its accreditation process were in compliance with the APA, apart from pointing out that the Court of Appeals is vested with original jurisdiction over challenges to final board orders.[25]

/s/ James L. Ryan
/s/ John W. Fitzgerald
/s/ Charles L. Levin
/s/ Thomas Giles Kavanagh
/s/ G. Mennen Williams
/s/ Mary S. Coleman

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25. MCL 290.705(2); MSA 12.94(105)(2).

2. OTHER OPINIONS AND ORDERS OF MICHIGAN COURTS, IN CHRONOLOGICAL SEQUENCE

a. ORDER OF DISMISSAL OF CIRCUIT COURT

(Filed April 26, 1974)

Ingham County Circuit
Court No. 74-16369-CZ

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants

At a session of said Court, held in the City Hall, in the City of Lansing, County of Ingham, Michigan, this 26th day of April, 1974;

Present: THE HONORABLE THOMAS L. BROWN, Circuit Judge.

This cause having been brought before the Court on an order to show cause under which plaintiffs sought various relief against the defendants, and the parties having appeared and with their counsel made arguments, the Court having received a motion to dismiss, made by the

defendants, and the Court having received briefs on the motions by the parties and having determined that such motion to dismiss should be granted, because the Court finds it lacks proper subject matter jurisdiction,

NOW, THEREFORE, IT IS ORDERED, that the complaint of the plaintiffs is dismissed for reasons set forth in the opinion of the court, which the Court is preparing for filing.

Thomas L. Brown
Circuit Judge

b. OPINION OF CIRCUIT COURT

(Filed May 3, 1974)

Ingham County Circuit
Court No. 74-16369-CZ

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants

The pleadings indicate that the Defendant Agricultural Marketing and Bargaining Board (Board), pursuant to its authority under The Agricultural Marketing and Bargaining Act (the Act), MCLA 290.701, *et seq.*, MSA 12.94 (101), *et seq.*, declared The Michigan Asparagus Growers as the accredited representative of the Asparagus bargaining unit. Michigan Asparagus Growers is a division of Defendant Michigan Agricultural Cooperative Marketing Association (MACMA). The Plaintiffs objected to designation and commenced the present action.

Following the filing of a verified complaint, the parties were before this Court to show cause why the Defendants should not be enjoined from enforcing the Act. At the oral arguments on the show cause order, Defen-

dants moved that the action be dismissed for lack of jurisdiction. Issues of law have been briefed by all parties.

The question before the Court is whether this Court or the Court of Appeals is the proper court to hear the issues presented by this case. The Act provides for review by the Court of Appeals. Plaintiffs wish to invoke the equitable powers of this Court, alleging procedural errors by the Defendant Board and constitutional defects in the Act.

Defendants contend that this Court does not have jurisdiction to review a decision by the Board. Section 5 of the Act, MCLA 290.705, MSA 12.94 (105) provides for review by the Court of Appeals. However, Plaintiffs reply that review by the Court of Appeals under Section 5 is inapplicable here. It is argued by Plaintiffs that the statutory review procedure is applicable only to orders issued pursuant to Section 4 of the Act.

The result of Plaintiff's logic would result in a bifurcated review procedure. Under the Act the Court of Appeals would hear any action taken under authority of Section 4. All other actions would be taken to Circuit Court as required by the Administrative Procedures Act, MCLA 24.302, 24.303; MSA 3.560(202), 3.560(203).

There is no specific language limiting the review procedure. The statute makes no special definition of an order or other relief. Therefore, this court interprets the statute to require review of all Board action in the Court of Appeals, leaving this Court without jurisdiction as to the matters before it.

Plaintiffs argue that despite the statutory review procedure this Court should exercise its equitable jurisdiction. Constitutional defects in the statute have been alleged by the Plaintiff. It has been held that equitable powers

may be invoked by a court, although administrative remedies have not been exhausted. *Smigel* v *Southgate School District*, 338 Mich 531 (1972); *Diggs* v *State Board of Embalmers*, 321 Mich 508 (1948); *Fitzpatrick* v *Liquor Control Commission*, 316 Mich 83 (1946); *General Motors Corp* v *Attorney General*, 294 Mich 558 (1940); *Lewis* v *State Board of Dentistry*, 277 Mich 334 (1936).

It would be a violation of principles of equity for this Court to exercise jurisdiction in this case. This Court would be involved in causing the proliferation of litigation. A most bizarre situation would be the result. Constitutional issues would be before this Court and all other issues of procedural and legal error before the Court of Appeals. This Court would be faced with the request to enjoin proceedings before the Court of Appeals while constitutional issues are resolved here. Therefore, it would be most inappropriate for this Court to interfere with the jurisdiction of the Court of Appeals.

Defendants' Motion for Dismissal for Lack of Jurisdiction is hereby granted. An order may so enter.

/s/ Thomas L. Brown
Circuit Judge

DATED: May 3rd, 1974.

c. ORDER OF COURT OF APPEALS GRANTING MOTION TO DISMISS CLAIM OF APPEAL (Case No. 20309)

(Filed October 22, 1974)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 22nd day of October in the year of our Lord one thousand nine hundred and seventy-four.

Present the Honorable
Robert J. Danhof
Presiding Judge
John Gillis
Timothy C. Quinn
Judges

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs-Appellants,

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants-Appellees.

In this cause a motion to expedite the appeal and a motion for limited remand are filed by plaintiffs-appellants, and answers thereto and a motion to dismiss the appeal

are filed by defendants-appellees, and due consideration thereof having been had by the Court;

IT IS ORDERED that the motion to dismiss the appeal be, and the same is hereby GRANTED. See *Porter* v *State Board of Examiners in Optometry*, 41 Mich App 150 (1972).

IT IS FURTHER ORDERED that the motion to expedite the appeal, and the motion for limited remand be, and the same are hereby DISMISSED as moot.

d. ORDER OF COURT OF APPEALS DENYING APPLICATION FOR LEAVE TO APPEAL
(Case No. 20310)

(Filed October 22, 1974)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 22nd day of October in the year of our Lord one thousand nine hundred and seventy-four.

Present the Honorable
Robert J. Danhof
Presiding Judge
John Gillis
Timothy C. Quinn
Judges

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs-Appellants,

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants-Appellees.

In this cause an application for leave to appeal, a motion for immediate consideration, a motion to expedite the appeal and a motion for limited remand are filed by plain-

tiffs-appellants, and answers in opposition thereto having been filed, and due consideration thereof having been had by the Court;

IT IS ORDERED that the motion for immediate consideration be, and the same is hereby GRANTED;

IT IS FURTHER ORDERED that the application for leave to appeal from the judgment entered by the circuit court be, and the same is hereby DENIED for lack of merit in the grounds presented, without prejudice to any party filing a petition for review from an order of the Agricultural Marketing and Bargaining Board under the provisions of PA 1972, No. 344;

IT IS FURTHER ORDERED that the motion to expedite the appeal and the motion for limited remand be, and the same are hereby DISMISSED as moot.

e. ORDER OF SUPREME COURT GRANTING LEAVE TO APPEAL

(Filed January 15, 1975)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 15th day of January in the year of our Lord one thousand nine hundred and seventy-five.

Present the Honorable
Thomas G. Kavanagh,
Chief Justice,
Thomas M. Kavanagh,
John B. Swainson,
G. Mennen Williams,
Charles L. Levin,
Mary S. Coleman,
John W. Fitzgerald,
Associate Justices

Supreme Court No. 56434

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs-Appellants,

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants-Appellees.

On order of the Court, the application by plaintiffs-appellants for leave to appeal is considered, and the same hereby is GRANTED.

This Court, without intending to limit the issues to be presented on appeal, invites the parties' detailed attention to the following questions: (1) Whether a unit determination is an "order" under Section 5(2) of 1972 PA 344, and (2) Whether 1972 PA 344 is constitutional in light of plaintiffs-appellants' arguments outlined in pp 10-12 of the complaint filed in Ingham County Circuit Court March 7, 1974.

If plaintiffs-appellants or defendants-appellees desire to make a factual record in connection with the issues in this case, this Court would entertain a petition from either party for remand within 20 days of the certification of this order. Such a remand would involve a prompt hearing before the Ingham County Circuit Court, the prompt preparation of an evidentiary record, and a prompt resolution of disputed questions of fact, not law, by the circuit court. In the event of such a remand, this Court would retain jurisdiction.

f. OPINION OF SUPREME COURT REVERSING DISMISSAL AND REMANDING CASE TO CIRCUIT COURT (FILED AUGUST 25, 1976) REPORTED AT 397 MICH. 337, 245 N.W. 2d 1

MICHIGAN CANNERS & FREEZERS ASSOCIATION, INC v AGRICULTURAL MARKETING & BARGAINING BOARD

Docket No. 56434.

WILLIAMS, J. The instant case poses important questions of first impression regarding the constitutionality and construction of the Agricultural Marketing and Bargaining Act, MCLA 290.701, *et seq.*; MSA 12.94(101), *et seq.* Plaintiff Michigan Canners and Freezers Association also challenges the decision of defendant Agricultural Marketing and Bargaining Board to accept and accredit the Michigan Asparagus Growers Division of defendant Michigan Agricultural Cooperative Marketing Association [MACMA] as the sole bargaining representative of the Processing Asparagus Bargaining Unit.

However, there has been no hearing in the courts below on the merits due to uncertainty on the preliminary procedural question as to which court should properly serve as a forum for the presentation of the issues posed in this case.

We remand to the circuit court for consideration of two issues: first, the constitutionality of the Bargaining Act, and second, the applicability of the Administrative Procedures Act to accreditation proceedings under the act.

I. FACTS

In November, 1973, the Michigan Asparagus Growers Division of appellee Michigan Agricultural Cooperative

Marketing Association, Inc., [MACMA] petitioned defendant Agricultural Marketing and Bargaining Board for a determination of an asparagus bargaining unit under the Michigan Agricultural Marketing and Bargaining Act [henceforth referred to as the Bargaining Act].

The board made such determination, and subsequently accredited Michigan Asparagus Growers as the sole sales and bargaining representative of the newly created Processing Asparagus Bargaining Unit, over the objection of plaintiff Michigan Canners and Freezers Association.

Michigan Canners brought an action in Ingham Circuit Court alternatively as a petition for review of a final decision of an administrative agency under the Administrative Procedures Act, MCLA 24.201 *et seq.*; MSA 3.560(101) *et seq.*, and as an original action seeking an injunction and declaratory ruling on the unconstitutionality and construction of the Agricultural Marketing and Bargaining Act.

The circuit court dismissed this action, ruling that under § 5(2) of the Bargaining Act, all board action requires review in the Court of Appeals.

Moreover, the circuit court explicitly declined to exercise its "equitable jurisdiction" to examine the constitutionality of the act. The court so ruled because it did not want to establish a bifurcated review procedure in which constitutional issues would be before the circuit court while all other issues were before the Court of Appeals.

In May of 1974, plaintiff filed for leave to appeal and a claim of appeal with the Court of Appeals. Both were denied in October, 1974.

Michigan Canners subsequently applied to this Court for leave to appeal the dismissals by the circuit court and the Court of Appeals.

Prior to granting of leave to appeal by this Court, Michigan Canners filed a petition for review in the Court of Appeals under § 5(2) of the Bargaining Act seeking a review of the constitutionality of the act and the procedures followed by the board in accrediting the Michigan Asparagus Growers Division.

MACMA moved to stay Court of Appeals proceedings pending decision by this Court on the application for leave to appeal.

This Court granted leave on January 15, 1975.

II. Remanding Constitutional Challenge to Circuit Court

As mentioned above, plaintiff has raised important questions regarding the constitutionality and construction of the Agricultural Marketing and Bargaining Act without developing a factual record at trial which would help provide a context in which to consider these questions.

To resolve these significant issues in such a factual vacuum would be imprudent where it appears that further factual development would substantially contribute to the proper disposition of the case.

Such is the case here, especially in that Michigan Canners has claimed that the Bargaining Act is unconstitutional because it exceeds the police power of the state. This claim in particular requires full development of facts which might support or undermine the claim that the statute is an invalid exercise of the police power.

The police power, an attribute of state sovereignty, may be properly exercised through regulations which tend to foster the health, order, convenience and comfort of the people and to prevent and punish injuries and offenses

to the public. It has as its object the preservation and/or improvement of social and economic conditions affecting the community at large. Such power is elastic in nature, changing shape as varying social conditions demand correction. *People* v *Sell*, 310 Mich 305, 315-316; 17 NW2d 193 (1945); *People* v *Brazee*, 183 Mich 259, 262; 149 NW 1053 (1914). *People* v *Raub*, 9 Mich App 114, 119; 155 NW2d 878 (1967).

As a matter of law, the party challenging the act carries the burden of overcoming the presumption of constitutionality which accrues to the statute. *Irishman's Lot, Inc.* v *Secretary of State*, 338 Mich 662, 667; 62 NW2d 668 (1954); *Thayer* v *Dept of Agriculture*, 323 Mich 403, 410; 35 NW2d 360 (1949). To overcome this presumption, plaintiff must show either that there is no public purpose to be served by the statute, or that there is no reasonable relationship between the remedy adopted by the Legislature and the public purpose. *Grocers Dairy Co* v *Dept of Agriculture*, 377 Mich 71, 75; 138 NW2d 767 (1966); *Carolene Products Co* v *Thomson*, 276 Mich 172, 178; 267 NW 608 (1936).

As a practical matter, we ask both parties to contribute to the development of a factual context which will allow us to properly resolve the issue of the constitutionality of the act under the principles outlined above. What are the conditions in the farming and food processing industry which led to the enactment of the act? Is there an imbalance in the bargaining power of the growers and the handlers? If so, what are the consequences of that imbalance? Is the number of farmers in Michigan declining? Is the acreage of land devoted to farming on the decrease? Is there reason for concern about food supply in the future? Is there a trend toward larger farms, to the detriment of the small farmer, which

might adversely affect the community at large? How will the operation of the act be beneficial or detrimental to producers, processors and consumers in the short run, and in the long run?

If any of the potential problems suggested above do exist, is there any evidence that the remedies embodied in the Bargaining Act are or are not reasonably related to the purpose of alleviating the problem(s)?

Defendant MACMA questions the appropriateness of the circuit court as a forum for the presentation of these issues given the language of § 5(2) of the Bargaining Act, MCLA 290.705(2); MSA 12.94(105)(2), providing in relevant part:

> "Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of an order in the court of appeals, by filing in the court a written petition requesting that the order of the board be modified or set aside."

However, it is well established that a litigant challenging the constitutionality of a statute and seeking injunctive relief is not necessarily required to follow the appellate procedure provided for in the statute challenged. *Diggs* v *State Board of Embalmers & Funeral Directors*, 321 Mich 508, 513; 32 NW2d 728 (1948); *Asta* v *Department of Revenue*, 338 Mich 505, 511; 61 NW2d 608 (1953); *Smigel* v *Southgate Community School District*, 338 Mich 531, 557; 202 NW2d 305 (1972).

We remand to the circuit court so that evidence relevant to these questions, and other questions related to the constitutionality of the Bargaining Act, may be received by that court.

III. Applicability of APA to Accreditation Proceedings

Plaintiff asserts that the Administrative Procedures Act, MCLA 24.201 *et seq.*; MSA 3.560(101), *et seq.*, is applicable to the Bargaining Act, that the board failed to comply with the requirements of APA.

Defendant MACMA disputes the applicability of APA to the Bargaining Act, and asserts that the circuit court is not the proper forum for consideration of this issue under § 5(2). There has been no hearing on the merits of this issue in the courts below.

While the Court of Appeals no doubt has subject matter jurisdiction over this matter of construction, so also does the circuit court. Section 5(2) provides for original jurisdiction in the Court of Appeals only for review of final orders of the Agricultural and Marketing Board.

However, the issue of the applicability of the APA to the Bargaining Act is not limited to the validity of a particular order, but rather involves a broad question of construction of the statute itself.

Therefore, there is no reason why plaintiff should not be allowed to raise this question before the circuit court on remand along with the constitutional issues.

IV. Validity of the Declaration of Accreditation

The circuit court may not, however, consider plaintiff-appellant's challenge to the validity of the declaration of accreditation of the Michigan Asparagus Growers on the merits for the Legislature has dictated in § 5(2) of the

Bargaining Act, MCLA 290.705(2); MSA 12.94(105)(2),[1] that the Court of Appeals has original jurisdiction over such an appeal.

Plaintiff-appellant asserts that the accreditation is invalid in that it is not based on substantial evidence of compliance with § 7 of the act,[2] as is required by § 5(2).

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1. Section 5(2) of the Bargaining Act reads as follows:

"(2) Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of an order in the court of appeals, by filing in the court a written petition requesting that the order of the board be modified or set aside. A copy of the petition shall be transmitted by the clerk of the court to the board and the aggrieved party shall file in the court the record in the proceeding certified by the board. Upon the filing of the petition, the court shall proceed in the same manner as in the case of an application by the board under this section and shall have the same jurisdiction to grant temporary relief or a restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the board; the findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

2. Section 7 of the Bargaining Act reads as follows:

"Sec. 7. An association shall be accredited upon determination by the board that the association meets all of the following:

(a) The association meets the requirements of the Capper-Volstead act, 7 U.S.C. 291-2.

(b) The association has submitted a copy of its bylaws which provide that: Each member of the association shall have 1 vote in all votes of the membership of the association; that officers or directors shall be elected by a majority of the members voting or by delegates representing a majority of the membership; and that all elections shall be by secret ballot.

(c) The association has marketing and bargaining contracts for the current or next marketing period with more than 50% of the producers of an agricultural commodity who are in the bargaining unit and these contracts cover more than 50% of the quantity of that commodity produced by producers in the bargaining unit. The board may determine the quantity produced by the bargaining unit using information on production in prior marketing periods, current market information, and projections

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It is further argued that such a claim may be heard by the circuit court because the declaration of accreditation is not an "order", as that term is used in § 5(2), which must be reviewed by the Court of Appeals.

We disagree with the claim that the declaration of accreditation is not an order under § 5(2).

In the first instance, we find it difficult to understand plaintiff's saying that § 5(2) applies to accreditation in establishing a requirement of substantial evidence in Court of Appeals review, and yet, does not apply to accreditation in establishing original jurisdiction in the Court of Appeals.

Moreover, an examination of the statute does not support plaintiff's claim that the Legislature intended to establish a bifurcated review procedure for actions of the board in which dispositions regarding unfair practices under the

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Footnote continued—

on production during the current market periods. The board shall exclude from that quantity any quantity of the agricultural commodity contracted by producers with producer owned and controlled processing cooperatives and any quantity produced by handlers. An association whose main purpose is bargaining but which processes a surplus into a form which is not the subject of bargaining is not a processing cooperative. The contracts with members shall specify the agricultural commodity and that the members have appointed the association as their exclusive agent in negotiations with handlers for prices and other terms of trade with respect to the sale and marketing of the agricultural commodity and obligate them to dispose of their production or holdings of the agricultural commodity through or at the direction of the association.

(d) The association has established and authorized a marketing and bargaining committee to negotiate with handlers for the agricultural commodity. The committee shall be comprised of members elected by the members in a secret ballot election. The production of the agricultural commodity shall comprise a significant portion of the total farming operation of each committee member. Members who have any quantity of the commodity contracted with a producer owned and controlled processing cooperative are not eligible to serve on a marketing and bargaining committee for such commodity."

act are "orders" to be reviewed by the Court of Appeals, while dispositions regarding accreditation are "determinations" to be reviewed in the circuit court.[3]

First, it should be noted that what is being challenged here is not merely a determination, but rather a "declaration of accreditation" which is issued after the board has determined that an association should be accredited.[4] While this declaration is not termed an "order" specifically, it functions as a binding order 30 days after publication, absent a challenge to the declaration meeting the requirements of § 10(2) of the act.[5]

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3. Plaintiff supports this claim by arguing that § 4 of the act, which deals with unfair practices, uses the word "order," while § 6 through 10, which deal with accreditation, speak of "determinations."

4. *See* § 10(1) of the Bargaining Act, which reads as follows:

"(1) The board shall issue and publish its determination within 30 days after the close of the hearing. If the determination of the board is to accredit the association, the board shall include a preliminary declaration of accreditation in its determination. The preliminary declaration of accreditation shall clearly state that the association shall represent all producers, members and nonmembers alike, who are in the bargaining unit and act as exclusive sales agents for the bargaining unit in negotiations with handlers. A producer covered in a declaration of accreditation may join the association and have full membership rights therein. Handlers shall deduct marketing service fees from the proceeds to be paid to producers for the agricultural commodity in the amount as determined by the association and forward the service fees promptly to the association. The fees shall be within guidelines determined by the board and shall be subject to review by the board upon petition by 15% of the affected producers."

5. Section 10(2) of the Bargaining Act reads as follows:

"(2) The accreditation of the association by the board shall be effective 30 days after the publication of the preliminary declaration of accreditation. The board shall delay the accreditation of the association whenever it receives during the 30-day period a petition signed by at least 1/3 of the producers in the bargaining unit who produce at least 1/3 of the production of

(Continued on following page)

Furthermore, the use of the word "determination" throughout the act does not suggest, as plaintiff-appellant claims, that the Legislature had carefully chosen this word to inferentially create a bifurcated review system in which the accreditations of bargaining associations are to be reviewed in a forum different from all other actions of the board.

The word "determination" is used with neither great precision nor consistency. In § 9, for example, the words determination and finding are used interchangeably for no apparent reason. In subsection (1), the Legislature used the words "determine" and "determination", while in subsection (2), there is a shift to the word "finding", though it is apparent that no change in meaning was intended.[6]

Footnote continued—

the agricultural commodity produced by the bargaining unit, exclusive of quantities contracted with processing cooperatives and produced by handlers, and requesting that the association should not be accredited. The board shall determine by a mail referendum of bargaining unit producers within 30 days following receipt of the petition if producers assent to the accreditation of the association. Producers in the bargaining unit shall be deemed to have assented to accreditation if more than 50% of the producers in the bargaining unit who produce more than 50% of the volume of the affected commodity assent to representation by the association."

6. Section 9 of the Bargaining Act reads as follows:

"(1) Within 60 days following the date of filing with the board a request for accreditation by an association, the board shall determine whether the association shall be accredited. If the board *determines* that insufficient evidence was filed by the association, the board may permit the association to file an amended request for accreditation within 30 days following the *determination* and notification of the association.

"(2) Within 30 days following the board's preliminary *finding* that the association is to be accredited, the board shall hold a public hearing to obtain further evidence relevant to confirmation that the association is to be accredited. Producers of record involved in the bargaining unit shall be notified of the hearing by mail and publication in a newspaper of general circulation in the bargaining unit area at least 10 days prior to the date of the hearing." (Emphasis added.)

In § 16, which deals with arbitration procedure, the word "determine" is used interchangeably with the word "find" and the word "determination" is used interchangeably with the word "finding", again, for no apparent reason.[7]

Moreover, the wording "finding" seems to be equivalent in this section to an order under § 5(2), for it is said that "This finding [of a reasonable quantity] shall be enforced in accordance with the provisions of section 5". MCLA 290.716(1); MSA 12.94(116)(1).

Such word usage does not suggest that the Legislature intended to establish a strict distinction between orders and determinations under § 5(2).

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7. Section 16 of the Bargaining Act reads in pertinent part as follows:

"Where the quantity of the agricultural commodity to be marketed is in dispute, the handler shall offer to accept for delivery a reasonable quantity of the agricultural commodity. This offer shall be made in writing to the accredited association at least 7 days prior to the start of the marketing period. A copy of this offer shall be sent by registered mail to the board. The accredited association may file a claim for relief with the board if it feels that the offer is unreasonable. The board shall *determine* the issue of reasonableness at a hearing in accordance with Act No. 306 of the Public Acts of 1969, as amended. This *determination* shall have priority over all other board matters. The board shall base its *determination* on: (a) Projections as to the quantity of the agricultural commodity to be produced, (b) the relationship between the quantity of the commodity available and the amount of the quantity accepted by the handler, (c) the kind, grade, and quality of the commodity available, and (d) the past practices of the handler in relation to the items in subdivisions (a), (b) and (c). If, upon the preponderance of the evidence, the board is of the opinion that the quantity is unreasonable, it shall *order* the handler to accept the quantity which the board *finds* to be reasonable. The *finding of the board shall be final*, subject to later modification by the joint settlement committee. *This finding shall be enforced in accordance with the provisions of section 5.* Within 15 days following the start of the marketing period for the agricultural commodity, the board shall establish a joint settlement committee to arbitrate the issues in dispute." (Emphasis added.)

The bifurcated system of review which plaintiff-appellant argues for would create unnecessary inconvenience and expense for parties disputing actions of the board, and we decline to conclude that the Legislature intended such without stronger indications of such intent.

V. Conclusion.

We remand to the circuit court for consideration of the questions of the constitutionality of the Agricultural Marketing and Bargaining Act, and the applicability of the Administrative Procedures Act to accreditation proceedings under the Bargaining Act. We retain appellate jurisdiction over the other issues presented in this case, and will consider those issues, along with the questions hereby remanded to the circuit court, subsequent to the disposition by the circuit court.

Kavanagh, C. J., and Levin, J., concurred with Williams, J.

Lindemer and Ryan, J.J., took no part in the decision of this case.

Coleman, J. (*concurring in part; dissenting in part*). Although it is accepted that the concept of police power is somewhat "elastic in nature", there is a danger here that it be stretched so far as to have no real meaning. Proposed standards such as that which fosters the "convenience and comfort of the people" or preserves and improves "social and economic conditions affecting the community at large" could justify almost any imaginable action.

Remand is proposed because the claim that the statute exceeds the police power "in particular requires full development of the facts". I agree with the remand providing that the trial judge develop those facts deemed

pertinent, but I would leave discussion of the constitutional question until we have the facts.

Unlike Justice WILLIAMS, however, I believe the circuit court may review the declaration of accreditation, although orders concerning unfair practices should be reviewed directly by the Court of Appeals.

The Agricultural Marketing and Bargaining Act, MCLA 290.701 *et seq.*; MSA 12.94(101) *et seq.*, was designed

> "to permit producers of agriculture commodities to be represented by associations; to create an agricultural marketing and bargaining board; to provide for the accreditation of associations; to establish obligations on the part of handlers and associations; to provide for arbitration; to define unfair practices; and to prescribe penalties."

Agricultural commodities are "all perishable fruits and vegetables as defined by the board". MCLA 290.702(f); MSA 12.94(102)(f). Producers of commodities may form

> "a cooperative association of producers or a division thereof, or federation of cooperative associations of producers engaged in the marketing, bargaining, shipping or processing functions of an agricultural commodity on behalf of its members who are producers of such agricultural commodity." MCLA 290.702(a); MSA 12.94(102)(a).

Associations may seek accreditation from the board. See MCLA 290.707-290.710; MSA 12.94(107)-12.94(110). The board has 60 days to make a preliminary determination. If accreditation is recommended, a public hearing must be held within 30 days. After the hearing, the board

has 30 days to issue and publish its determination. The accreditation "shall be effective 30 days after the publication" unless objection is made by at least 1/3 of the producers who together produce at least 1/3 of the commodity.

If an objection is made, the board must hold a "mail referendum" within 30 days to "determine * * * if producers assent to the accreditation of the association." If "more than 50% of the producers * * * who produce more than 50% of the volume of the affected commodity" agree to be represented by the association, then producers "in the bargaining unit shall be deemed to have assented to accreditation". MCLA 290.710(2); MSA 12.94(110)(2). With assent, accreditation is effective immediately; without it, accreditation is denied. MCLA 290.710(3); MSA 12.94(110)(3).

An accredited association "shall represent all producers, members and nonmembers alike". It acts "as exclusive sales agents for the bargaining unit in negotiations with handlers". MCLA 290.710(1); MSA 12.94(110)(1). This is an expansive grant of authority. The Legislature provided a deliberate procedure permitting informed decision-making by the producers. The board does not make the ultimate determination of accreditation. That decision lies in the hands of the producers.

Compare with this the Legislature's concern with unfair practices. All associations, accredited or not, are covered. They are protected from the unfair practices of handlers. MCLA 290.704(1); MSA 12.94(104)(1). They are prohibited from committing unfair practices against handlers. MCLA 290.704(2); MSA 12.94(104)(2).

The board may receive complaints. If it "considers that there is reasonable cause to believe that a person charged has committed a practice in violation of this act",

the board must hold a hearing. MCLA 290.704(3); MSA 12.94(104)(3). If "a preponderance of the evidence" shows a violation, the board "shall issue * * * an order requiring him to cease the violation and shall order further affirmative action as will effectuate the policies of this act". MCLA 290.704(4); MSA 12.94(104)(4).

The Legislature selected the Court of Appeals as the forum to review the board action. The board "may petition the court of appeals for the enforcement of its orders, and for appropriate temporary relief or restraining order". MCLA 290.705(1); MSA 12.94(105)(1). This gives the court "jurisdiction of the proceeding and of the question determined". It "may grant temporary relief or restraining order as it deems just and proper". It may enforce, modify or set aside the board's order. Anyone aggrieved by the board's final order may obtain a similar review. MCLA 290.705(2); MSA 12.94(105)(2).

Unfair practices involve coercion, intimidation, conspiracy and acts disrupting the normal handling of perishable commodities. The board is obliged to hold a hearing, make a record and state its findings of fact which are conclusive "if supported by substantial evidence on the record considered as a whole". The Court of Appeals may order the taking of additional evidence.

Unfair practice complaints demand prompt action to prevent damage to crops and to defuse explosive situations. The Legislature gave the board authority to order that violations cease. The board may order that affirmative actions be taken. Its role in those situations differs greatly from the accreditation process. In the absence of a clear legislative directive, the review procedure provided for unfair practice cases should not be applied to accreditation.

FITZGERALD, J., concurred with COLEMAN, J.

ORDER

Entered November 1, 1976.—REPORTER.

On order of the Court, the motion for clarification of opinion is considered, and the same is granted. As to question 1 presented, it is ordered that the parties be permitted to present evidence on the constitutional questions already raised in this case. As to question 2, the circuit court may render an opinion concerning the applicability of the Administrative Procedures Act, but a dispositive order on the question shall not be issued until this Court issues final process after considering the case after the remand proceedings. As to question 3, the parties have a right to return to this Court upon completion of the remand proceedings.

The motion for leave to amend complaint and/or add additional ground of appeal is considered, and the Court, under GCR 1963, 865.1(1) and 865.1(3), hereby allows plaintiffs-appellants to amend their verified complaint and permits the issue raised by plaintiffs-appellants to be added to the issues on appeal.

LINDEMER and RYAN, JJ., not participating.

g. OPINION OF CIRCUIT COURT UPHOLDING VALIDITY OF STATE ACT (FILED FEBRUARY 2, 1981)

Ingham County Circuit Court
No. 74-16369-CZ

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs,

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants.

This matter was remanded by the Supreme Court to the Circuit Court for consideration of two issues:

1. The constitutionality of the Agricultural and Marketing and Bargaining Act, hereafter referred to as "the Act," MCLA 290.701, *et seq;* MSA 12.94 (101), *et seq,* and

2. The applicability of the Administrative Procedures Act (APA) to accreditation proceedings under the Act.

The Supreme Court asked the parties to "contribute to the development of a factual context which will allow us to properly resolve the issue of constitutionality of the Act."

Eleven days of proceedings were conducted commencing September 6 and ending September 27, 1977. Thirty-one witnesses appeared and gave testimony. The parties

supplied to the court proposed findings of fact with proposed conclusions of law. In addition, the matter has been fully briefed by the parties.

The Supreme Court asked the parties, respecting the constitutional issue, to provide answers to the following questions:

1. What are (were) the conditions in the farming and food processing industry which led to the enactment of the Act?

2. Is there an imbalance in the bargaining power of the growers and the handlers (processors)?

a. If so, what are the consequences of that imbalance?

3. Is the number of farmers in Michigan declining?

4. Is the acreage of land devoted to farming on the decrease?

5. Is there reason for concern about food supply in the future?

6. Is there a trend toward large farms, to the detriment of the small farmer, which might adversely affect the community at large, and

7. How will the operation of the Act be beneficial or detrimental to producers (growers), processors and consumers in the short run, and in the long run?

The Supreme Court further asked the parties to present any evidence that the remedies in the Act are or are not reasonably related to the purpose of alleviating any of the potential problems outlined in 1 through 7 above.

As to 1 the court finds the following conditions existed prior to the enactment of the Act:

a) The growers faced the problem of extremely perishable fruits and vegetables with a corresponding universal lack of freezing and/or storage facilities (Stover, Cohill);

b) The processors were reluctant to recognize voluntary grower cooperative bargaining associations (Torgerson);

c) The processors were known by the growers to discriminate against persons who belonged to cooperative bargaining associations (Handy, Torgerson);

d) There existed a "take it or leave it" pricing policy with no authority in the fieldmen of the processors to negotiate price (Cohill, Dorman, Kennedy, Toan, Shaffer, Torgerson);

e) The market lacked an extensive number of buyers and the growers lacked ability to transport the perishable goods any distance (Shaffer, Stuckman, Garoyan);

f) The growers engaged in picketing of processors and withholding perishable goods because of unsatisfactory prices (Cohill, Stover, Stuckman, Toan);

g) It was difficult to develop and maintain voluntary bargaining associations because some persons obtained a "free ride;" (Anthony, Handy, Shaffer, Stover, Stuckman);

h) It was difficult to coordinate production and marketing decisions so as to reduce spoilage (Shafer);

i) The establishment of the price by the eventual buyer (i.e. A & P, Kroger, etc.), subject to approval by processor management, resulted in a predetermined price without grower input;

j) The inability to predict or control what would happen during the growing and marketing period (i.e.

weather) which would affect the price of products (Anthony);

k) The establishment of price on the basis of "commercial market value" of the raw product, (i.e. that which a grower would receive if sold on the open market) (Cumming);

l) The need for a state-wide organization with emphasis on a particular product, (i.e. apples, cherries) (Collins);

m) The fact that the price received by farmers (growers) fluctuated more than prices for other products (Dahl);

n) The fact that growers and processors were at the mercy of powerful market forces, supply and demand, and, if a short supply developed, the grower had the advantage; if not, the processor had the advantage (Dahl);

o) Large number of unorganized growers who, when aligned against a concentration of processors, could not individually affect price (Garoyan);

p) The processor possessed the resources to obtain superior marketing knowledge, while the grower lacked time to obtain the information (Garoyan);

q) The grower lacked knowledge of the price to be paid for his product until after it had been delivered (Kennedy);

r) Inability of some growers (fruit) to shift easily to other crops if the demand existed or weather an economic factors caused reduced production (Shaffer, Torgerson);

s) The inability to control the supply along with what quantity to produce to influence the market (Shaffer).

It is obvious that myriad problems existed which the act proposed to treat.

A disparity of bargaining power did exist with the following consequences:

a) A concentration of processors and lack of collective power in the growers (Cohill, Garoyan, Kennedy, Stuckman, Torgerson);

b) The growers had a limited role in the determination of the price they would receive for the raw product (Cohill, Garoyan, Kennedy, Stuckman, Torgerson);

c) Although growers had available to them information necessary to diversify crops, to utilize modern technology and to secure sufficient information to effectively market other corps, they lacked the time and technical skills to put the information to effective use (Dahl, Shaffer);

d) If lack of quantity of a given crop existed, the growers possessed superior bargaining power; if not, then the processor had the upper hand (Dahl).

The Court finds that the number of Michigan farmers was decreasing (Wright, Dahl), but the size of remaining farms was constantly increasing with the result that the total acreage devoted to farming remained fairly constant while production increased markedly (Dahl).

In addition, while the total number of workers in farming decreased, mostly family members, production increased and a trend towards larger, more automated farms existed (Brunk).

There was also, as a consequence, a trend towards fewer, more concentrated, processors (Brunk).

The evidence further discloses that the total acreage of land in Michigan devoted to farming was on the de-

crease, but productivity was up and the average size of farms increasing, including the large corporate farms (Dahl).

There appears to be no reason to fear a marked reduction in the food supply, quantity or quality, in the foreseeable future (Dahl, Garoyan, Shaffer) but long range concern for food supply in the less developed countries did exist (Wright).

The evidence, as outlined above, does disclose a trend toward larger farms. The important concern, however, is whether this trend is detrimental to the community at large.

The experts disagree whether this trend is a reason for much concern.

It appears that although total acreage has remained about constant or decreased slightly the production has increased markedly (Dahl). Further, small farms were never a significant factor in the production of the overall farm products (Dahl). Further, as farms become larger they become more efficient, purchase proportionately more goods and pay higher property and income taxes (Dahl). In addition, although larger farms make better use of economies of scale and technology (Dahl, Brunk), large corporate farms command less than 1% of the sales of commercial farms in Michigan (Brunk).

The Court finds that the act will be beneficial to growers in the following ways:

1) no picketing (Shaffer, Toan, Torgerson);

2) less vulnerability, more effective representation and voice (Dahl, Stuckman);

3) binding arbitration to quickly settle disputes (Haughton);

4) price stability and leveling of price variations to create a more orderly bargaining process (Garoyan, Torgerson);

5) the ability to obtain market information in usable form (Shaffer).

The Court finds that the act will cause the following detrimental situations to occur as to growers:

1) the processors will increase out-of-state purchases for a better price (Bowman, Dahl, Anthony, Doran, Leaver);

2) the friendly relationship between grower and processor, which existed in many instances, will deteriorate (Bowman, Dahl, Catey, Hubbard, Goodall, Prillwitz, Van Mier);

3) the grower, in some instances, will lose the ability to cross-bargain, i.e., lower prices for one product in return for a higher price in another (Collins, Prillwitz);

4) the products, being perishable, will deteriorate due to delays in negotiations (Goodall); and

5) the act will accelerate the movement to larger farms and cause a corresponding processor concentration (Dahl, Garoyan).

The court finds the act will be beneficial to processors in the following manner:

1) there will be no picketing of processor plants nor a "dumping" of perishable products (Shaffer, Torgerson);

2) the processor will be able to concentrate efforts towards fewer growers with a corresponding reduction in field men (Dahl);

3) the price for a given product (asparagus, potatoes, tart cherries, apples, kraut cabbage) will be uniform (Torgerson); and

4) there will be a regulated supply and greater ability to negotiate quality (Torgerson).

The court finds that the following factors will be detrimental to the processors:

1) the price will be established by persons other than the processor management or the processors eventual customer (Catey);

2) the act will cause certain processors to relocate plants (Brian, Brunk, Catey, Dahl, Garoyan);

3) the act will prevent the processors from engaging in long range planning (Garoyan, Toan);

4) the act will cause higher incentives because of a "supply response", i.e. the grower will produce a greater supply than the demand if the price is right (Brian).

The consumer should enjoy the following benefits from the act:

1) cooperative activity should improve the quality of the product because quality is a negotiable item (Torgersen), contrary to what plaintiff experts (Dahl and Brunk) insist;

2) the consumer should have a steady, more reliable supply of products (Shaffer, Torgerson); and

3) in addition, the consumer should have a greater selection of products (Torgerson).

On the negative side, the consumer will experience the following ill effects:

1) increased food prices (Dahl);

2) a reduction in plant employment, a loss of plant expansion (Brunk, Dahl) and reduced tax revenues (Dahl).

The court believes certain problems (listed first) will be alleviated by remedies proposed in the act (listed second).

PROBLEM: *Supply and Demand*

The marketing committee in charge of certain products will be aware of price demands so that the price negotiated will not force the processor to purchase out-of-state (Anthony, Stover).

A serious concern exists in this area; that is, the act controls "price" and price, by operation of the market, controls "demand." If demand goes up, up goes supply and price by the Act remains the same. The experts believe the act, or amendments to it, should do something about this "supply response" (Dahl, Garoyan).

PROBELEM: *Negotiable Price*

The act provides for control by various marketing committees of the entire commodity within a given area so the committee possesses bargaining power (Kennedy). In addition, the act allows the parties to reach an agreement for less than the recommended price (Foster).

PROBLEM: *Picketing*

No picketing has occurred since the adoption of PA 344 regarding any commodity which had an accredited association (Stover, Stuckman).

PROBLEM: *Imbalance in Bargaining Power*

The growers have acquired the ability to act collectively (Garoyan, Torgerson, Shaffer, Stuckman), and outlets are available for the raw product (Cohill, Anthony, Stover).

PROBLEM: *Obtaining of market information in usable form*

Through the efforts of the various marketing committees, information will be available and presented in brief, analyzed form (Shaffer, Stover).

PROBLEM: *The individual "unorganized" farmer*

The act makes it far less likely that processors will be able to "gang up" on individual farmers to obtain a favorable price (Garoyan, Torgerson, Shaffer, Stuckman).

PROBLEM: *Uniform Price*

The act makes it far more likely that the same price will be paid to all growers on the same quality product (Shaffer, Stuckman).

PROBLEM: *Waste, deterioration and spoilage (perishability)*

The processes of the act allowing for collective bargaining and arbitration should result in obtaining an early agreement so the problem of perishability is avoided (Haughton). The grower will be aware of the price, will deliver when the product is harvested and the processor will be prepared for the arrival of the product and the price to be paid.

PROBLEM: *Voluntary cooperatives*

The problems of the "free rider" (a non-member who enjoys the co-op price without belonging or paying) and the "sweetheart contract" (a device engaged in by processors to arode the power of the voluntary co-operative) will both be made obsolete by the provisions of the act.

As indicated by the Supreme Court, the plaintiff must show, in order to overcome the presumption of constitutionality, that either:

1) there is no *public purpose* to be served by the statute, or

2) there is no reasonable relationship between the legislative remedy and the public purpose.

In this case, the legislature has enacted this statute to respond to the myriad of problems proven by the credible evidence to exist prior to the legislative response.

The farmer was producing a perishable commodity without adequate knowledge of the expenses to put into its production (i.e. gasoline, fertilizer), in relationship to the price to be received on harvest day. The farmer (grower) came "hat in hand" to the processors and took whatever price he could get. Many times the farmer did not even obtain a price adequate to repay all of his expenses and fixed costs. He was a "price taker", receiving whatever sum he could obtain for a commodity he could not store, freeze or transport elsewhere. The farmer (grower) was, individually, at the mercy of the processor.

The farmer tried to solve this processor power concentration by organizing into "voluntary co-ops." But, this did not work because some individuals made "deals" of their own (sweetheart contracts) or some individuals profited by the activity of the co-op without contributing to its maintenance and welfare (free riders). So the legislature was approached to assist with the act to make membership mandatory and to provide for financial assistance to various bargaining groups.

It should be viewed as fortuitous that a knowledgeable member of the farming business was a member of the legislature, to wit, Bela Kennedy.

An act was passed and given an expiration date (sunset provision). The legislature on a subsequent date removed this expiration date by a wide margin.

The act solves some problems, creates others and does very little, if anything, to deal with a basic concern (i.e.

supply). It would appear that the act will raise prices to the consumer, but at the same time assist the commercial farmer to continue in business, hire help, pay taxes and produce a quality product.

The processors threaten to move out of state or to purchase products out of state at a more reasonable price. This has already happened. The trend appears, however, to be towards increasing the number of states having similar laws, which will prevent, to some extent "shopping around" or relocating by the processors.

The act is, however, as demonstrated by the evidence, reasonably related to the problems perceived by the legislature and is a reasonable attempt to solve at least some of the problems. *Grocers Dairy Co* v *Dept of Agriculture*, 377 Mich 71, 75; 138 NW2d 767 (1966); *Carolene Products Co* v *Thomson*, 276 Mich 176, 178; 267 NW 608 (1936).

The act further proposes to serve a public purpose by allowing the grower (farmer) of certain applicable products (apples, cherries, cabbage, potatoes and asparagus) to have knowledge in advance of the price to be paid for this product. If the price is reasonable and fair a quality product may be bargained for and shipped to the processor. Absent the intangibles such as the weather, the grower should be able to receive a fair profit, thereby insuring that farmers will stay in business, purchase other goods and pay taxes. A public purpose is intended to be served by this statute. It is, therefore, constitutional. *Grocers Dairy Co, supra; Carolene Products Co, supra.*

In conclusion, the court agrees with defendant Board when it argued:

> In summary, the activities sanctioned by this Act benefit not only the growers but also the processors, who will be guaranteed an adequate commodity supply,

and the citizens of the State of Michigan generally. Such activities are well within constitutional limits on the exercise of the police power of the State of Michigan.

The next consideration respecting the inquiry regarding the constitutionality of the act is the question whether it is preempted by the Agricultural Fair Practice Act of 1976 (AFPA).

The plaintiffs assert that the act must be considered unconstitutional, pursuant to the supremacy clause of the U.S. Constitution, in that it is preempted by and is inconsistent with AFPA.

All parties agree, although state it in different ways and in a different order, that preemption of state law by federal legislation can occur in two ways:

1) if a state statute actually conflicts with a federal statute, or stated another way, federal preemption occurs where there is an actual conflict between the federal and state law, and,

2) whenever Congress has acted to provide complete regulation in any given area of commerce, or stated another way, where Congress has occupied the entire field of regulation of a particular subject matter.

See *Florida Lime & Avocado Growers, Inc* v *Paul*, 373 US 132, 83 S Ct 1210, 10 LEd 2d 248 (1963); *Jones* v *Rath Packing Co*, 97 S Ct 1305 (1977).

The court agrees before applying these federal principles to this matter that it would be helpful to determine the nature and purpose of AFPA.

It is clearly evident that Congress believed the bargaining position of farmers deserved improvement; that the farmers should be allowed to join cooperative organiza-

tions to enable them to concentrate power to present a strengthened position to the processors. This was clearly to solve some of the problems presented to the Michigan Legislature, as outlined at trial and as spoken to at the commencement of this opinion.

It is clearly, in the opinion of the court, the objective of AFPA to assist the farmers in their marketing and bargaining position with processors and the AMABA seeks to achieve the same purpose, along with additional help not provided in AFPA.

Equally clear was the congressional intent to preserve the farmers right to opt in or opt out of a cooperative venture in its enactment of AFPA. See Congressional Record, Vol 114, pp 7449, 7450. However, the AMABA does not disturb this right. The act does force growers of products bargained for by recognized bargaining boards to accept the negotiated terms. This suggested loss of freedom is no more significant than that lost by a nonunion member employed in an agency shop.

The majority of a group of growers under AMABA must agree in order to secure the provisions of the act and the minority, for the good of all, are required to go along. The freedom to deal individually is gone, but the advantage of collective action, a united front and a reduced disparity of bargaining power is gained.

The said acts are not therefore in actual conflict so as to render the act (PA 344) preempted by AFPA.

It is obvious that Congress has not sought to occupy the entire field of regulating in this area. The federal act itself provides:

> The provisions of this chapter shall not be construed to change or modify existing state law nor to deprive the proper state court of jurisdiction. 7 US 2305

Additionally, the court is directed to the case of *Pure Milk Co-op* v *National Farmers Organization*, DC Wis (1971), 332 F Supp 866, where the court indicated Congress had not preempted the field of agricultural marketing.

The plaintiffs have directed the court to *Jones* v *Rath Packing, supra*, for the proposition that the federal government has preempted the field of regulation. This case, as the court understands it, stands for the proposition that state law must fall if it "triggers" federal enforcement action.

There is nothing in the proofs which would convince the court of this possibility. In fact, the proofs appear to be to the contrary. Witness Torgerson, a USDA official, indicated that compliance with AMABA would not "trigger" federal enforcement of AFPA.

The reliable proof appears to lie on the side of the defendants which proof would indicate no inconsistency between the two laws.

Therefore, the request that the court find the act unconstitutional on this basis is denied.

The final question for resolution is whether the Administrative Procedures Act, MCLA 24.201, *et seq*; MSA 3.560(101), *et seq*, (APA), is applicable to accreditation proceedings, Sec 9(2) of the Agricultural Marketing and Bargaining Act (AMABA).

Sec 3(3) of the APA, MCLA 24.203(3); MSA 3.650 (103)(3), provides:

> "'Contested case' means a proceedings . . . in which determination of the legal rights, duties or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing."

Sec 9(2) of the AMABA, MCLA 290.709; MSA 12.94 (109), provides:

> Within 30 days following the Board's preliminary finding that the Association is to be accredited the Board shall hold a public hearing to obtain further evidence relevant to confirmation that the Association is to be accredited. Producers of record involved in the bargaining unit shall be notified of the hearing by mail and publication in a newspaper of general circulation in the bargaining unit area at least 10 days prior to the date of the hearing.

It is contended by the plaintiffs, and not seriously contested by the defendants, that the Board is an "agency" under the APA.

It is further asserted by the plaintiffs, and not seriously contested by the defendants, that the proceedings before the Board could involve a determination of the rights and privileges of a named party, to-wit, MACMA.

The only remaining issue is whether the hearing provided is for the purpose of "determining the legal rights, duties or privileges" of MACMA, or, as contended by defendant MACMA, to simply gather further information to confirm the preliminary findings.

The plaintiffs contend that defendant Board agrees the proceeding was a "contested case" within the meaning of the APA. The Court does not find this to be the situation. Defendant Board agrees that the accreditation hearing held by the Board was not held in accordance with the APA, not that it needed to be.

The Court believes that Sec 9(2) calls for input by parties with a possible adversary relationship by way of a public hearing to gather evidence to bear upon a final

determination regarding accreditation. This appears to put this provision of the Act squarely in line with the contested case definition of the APA, and the Court so finds.

The Court agrees that the AMABA need not specifically provide for the express imposition of APA standards in order for APA standards to apply, and the fact the AMABA in certain sections makes provision for the application of the APA does not exclude other sections from being so construed.

An order may enter consistent with the opinion of the court.

/s/ Thomas L. Brown
Thomas L. Brown, Circuit Judge

DATED: January 30th, 1981.

h. ORDER OF CIRCUIT COURT (FILED MARCH 31, 1981)

Ingham County Circuit
Court No. 74-16369-CZ

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants

At a session of said Court, held in the City Hall, City of Lansing, County of Ingham, State of Michigan, on this 31st day of March, 1981.

PRESENT: HONORABLE THOMAS L. BROWN, Circuit Judge

This cause, having been remanded to this Court by the Michigan Supreme Court, *Michigan Canners and Freezers Association, Inc, et al* v *The Agricultural Marketing and Bargaining Board, et al*, 397 Mich 337; 245 NW2d 1 (1976), and having been tried by the Court without a jury, commencing September 6 and ending September 27, 1977, the parties having appeared by their respective attorneys, briefs and findings of fact having been submitted and the

Court having reviewed the entire record in the matter and having rendered a written opinion dated January 30, 1981, which is attached hereto and incorporated by reference herein;

IT IS HEREBY ORDERED, for the reasons stated in the Court's written Opinion, that the Agricultural Marketing and Bargaining Act, 1972 PA 344; as amended, MCLA 290.701 *et seq;* MSA 12.94(101) *et seq*, is found to be constitutional with respect to the challenges made by the Plaintiffs and,

It is the opinion of the Court that the Administrative Procedures Act, 1969 PA 306, as amended, MCLA 24.201 *et seq;* MSA 3.560(101) *et seq*, is applicable to the accreditation proceedings set forth in Section 9(2) of the Agricultural Marketing and Bargaining Act.

/s/ Thomas L. Brown
Thomas L. Brown, Circuit Judge

3. JUDGMENT OF MICHIGAN SUPREME COURT APPEALED FROM (FILED DECEMBER 23, 1982)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 23rd day of December in the year of our Lord one thousand nine hundred and eighty two.

Present the Honorable
John W. Fitzgerald,
Chief Justice
Thomas Giles Kavanagh,
G. Mennen Williams,
Charles L. Levin,
Mary S. Coleman,
James L. Ryan,
Dorothy Comstock Riley,
Associate Justices

SC 56434
CoA 20310
LC 74-26369 CZ

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs-Appellants,

v

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants-Appellees.

This cause having been brought to this Court by appeal from the Court of Appeals and this Court having remanded the cause to the Circuit Court for the County of Ingham for development of a factual record and the cause having been argued by counsel and due deliberation had thereon by the Court, IT IS HEREBY ORDERED AND ADJUDGED for reasons set forth in the opinion filed herein, (1) that the Agricultural Marketing and Bargaining Act, MCL 290.701 *et seq.* is constitutional and (2) that the accreditation procedures of the Agricultural Marketing and Bargaining Act, MCL 290.701 *et seq.* are subject to the provisions of the Administrative Procedures Act (MCL 24.201 *et seq.*)

Riley, J., not participating.

4. NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES (FILED MARCH 8, 1982)

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
(Nos. 20309 and 20310)

Ingham County Circuit Court No. 74-16369-CZ
Supreme Court No. 56434

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs-Appellants,

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants-Appellees.

TO: Hon. Harold Hoag, Clerk
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PLEASE TAKE NOTICE that Michigan Canners and Freezers Association, Inc., the individual members of the Michigan Canners and Freezers Association, Inc., Dukesherer Farms, Inc. and Ferris Pierson, Plaintiffs-Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Michigan Supreme Court entered December 23, 1982.

This appeal is taken pursuant to Title 28 of the United States Code, Section 1257(2).

Dated: March 7, 1983

Warner, Norcross & Judd
By /s/ Ernest M. Sharpe
Ernest M. Sharpe (P-20294)
And
By /s/ Joseph G. Scoville
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PROOF OF SERVICE

STATE OF MICHIGAN)
: ss.
County of KENT)

Nancy Barnard, being duly sworn, states that on the 7th day of March, 1983, she caused to be served a copy of Plaintiffs-Appellants' Notice of Appeal To The Supreme Court of The United States, filed with this Court, in this action, upon the following persons, at their addresses

stated, by first class United States mail, with postage prepaid thereon:

Henry J. Boynton, Esq.
Attorney General's Office
Plaza One Building, Suite One
Lansing, Michigan 48913
James A. White, Esq.
Foster, Swift, Collins & Coey
313 South Washington Square
Lansing, Michigan 48933

/s/ Nancy Barnard
Nancy Barnard

Subscribed and sworn to before me, a Notary Public, this 7th day of March, 1983.

/s/ Lucille C. Grant
Notary Public, Kent County, Michigan

My commission expires: April 17, 1983

5. STATUTES INVOLVED

a. FEDERAL AGRICULTURAL FAIR PRACTICES ACT OF 1967

(Public Law 90-288)
(7 U.S.C. § 2301 *et seq*)

§ 2301. Congressional findings and declaration of policy

Agricultural products are produced in the United States by many individual farmers and ranchers scattered throughout the various States of the Nation. Such products in fresh or processed form move in large part in the channels of interstate and foreign commerce, and such products which do not move in these channels directly burden or affect interstate commerce. The efficient production and marketing of agricultural products by farmers and ranchers is of vital concern to their welfare and to the general economy of the Nation. Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law. Interference with this right is contrary to the public interest and adversely affects the free and orderly flow of goods in interstate and foreign commerce.

It is, therefore, declared to be the policy of Congress and the purpose of this chapter to establish standards of fair practices required of handlers in their dealings in agricultural products.

§ 2302. Definitions

When used in this chapter—

(a) The term "handler" means any person engaged in the business or practice of (1) acquiring agricultural

products from producers or associations of producers for processing or sale; or (2) grading, packaging, handling, storing, or processing agricultural products received from producers or associations of producers; or (3) contracting or negotiating contracts or other arrangements, written or oral, with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product; or (4) acting as an agent or broker for a handler in the performance of any function or act specified in clause (1), (2), or (3) of this paragraph.

(b) The term "producer" means a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower.

(c) The term "association of producers" means any association of producers of agricultural products engaged in marketing, bargaining, shipping, or processing as defined in section 1141j(a) of Title 12, or in section 291 of this title.

(d) The term "person" includes individuals, partnerships, corporations, and associations.

(e) The term "agricultural products" shall not include cotton or tobacco or their products.

§ 2303. Prohibited practices

It shall be unlawful for any handler knowingly to engage or permit any employee or agent to engage in the following practices:

(a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association; or

(b) To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers; or

(c) To coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler; or

(d) To pay or loan money, give any thing of value, or offer any other inducement or reward to a producer for refusing to or ceasing to belong to an association of producers; or

(e) To make false reports about the finances, management, or activities of associations of producers or handlers; or

(f) To conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by this chapter.

§ 2304. Disclaimer of intention to prohibit normal dealing

Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers.

§ 2305. Enforcement provisions—Civil actions by persons aggrieved; preventive relief; attorneys' fees; security

(a) Whenever any handler has engaged or there are reasonable grounds to believe that any handler is about to engage in any act or practice prohibited by section

2303 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved. In any action commenced pursuant hereto, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. The court may provide that no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Civil Actions by Attorney General; Federal Jurisdiction; Complaint; Preventive Relief

(b) Whenever the Secretary of Agriculture has reasonable cause to believe that any handler, or group of handlers, has engaged in any act or practice prohibited by section 2303 of this title, he may request the Attorney General to bring civil action in his behalf in the appropriate district court of the United States by filing with it a complaint (1) setting forth facts pertaining to such act or practice, and (2) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the handler, or handlers, responsible for such acts or practices. Upon receipt of such request, the Attorney General is authorized to file such complaint.

Suits by Persons Injured; Federal Jurisdiction; Amount of Recovery; Attorneys' Fees; Limitation of Actions

(c) Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, any provision of section 2303 of this title may

sue therefor in the appropriate district court of the United States without respect to the amount in controversy, and shall recover damages sustained. In any action commenced pursuant to this subsection, the court may allow the prevailing party a reasonable attorney's fee as a part of the costs. Any action to enforce any cause of action under this subsection shall be forever barred unless commenced within two years after the cause of action accrued.

Federal Jurisdiction; Exhaustion of Other Remedies; State Laws and Jurisdiction Unaffected

(d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

The provisions of this chapter shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction.

§ 2306. Separability of provisions

If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and of the application of such provision to other persons and circumstances shall not be affected thereby.

b. MICHIGAN AGRICULTURAL MARKETING AND BARGAINING ACT

(Act 344, 1972, p 1010; eff March 30, 1973.)
(Mich. Comp. Laws § 290.701 *et seq*)

AN ACT to permit producers of agriculture commodities to be represented by associations; to create an agricultural marketing and bargaining board; to provide for the accreditation of associations; to establish obligations on the part of handlers and associations; to provide for arbitration; to define unfair practices; and to prescribe penalties.

The People of the State of Michigan enact:

Sec. 1. This act shall be known and may be cited as the "agricultural marketing and bargaining act". (Mich. Comp. Laws §290.701.)

Sec. 2. As used in this act:

(a) "Association" means a cooperative association of producers or a division thereof, or federation of cooperative associations of producers engaged in the marketing, bargaining, shipping or processing functions of an agricultural commodity on behalf of its members who are producers of such agricultural commodity.

(b) "Accredited association" means an association accredited in accordance with this act.

(c) "Person" means an individual, partnership, corporation or association.

(d) "Board" means the agricultural marketing and bargaining board created in section 3.

(e) "Producer" means any person who produces or causes to be produced in any 1 marketing period within

the previous 2 marketing periods, any agricultural commodity in quantity beyond his own family use and having a minimum value at first point of sale as determined by the board for that agricultural commodity, and who is able to, during the marketing period transfer to a handler or an association a merchantable title to the agricultural commodity or provide management, labor, machinery, facilities or any other production input, with the assumption of risk, for the production of the agricultural commodity under a written or oral contract.

(f) "Agricultural commodity" means all perishable fruits and vegetables as defined by the board. The kinds, types and subtypes of products to be classed together as an agricultural commodity for the purposes of this act shall be determined by the board on the basis of common usage and practice.

(g) "Handler" means a person other than an association engaged in the business or practice of acquiring agricultural commodities from producers or associations for processing or sale; grading, packaging, handling, storing or processing agricultural commodities received from producers or associations; contracting or negotiating contracts or other arrangements, written or oral, with producers or associations with respect to the production of any agricultural commodity; or acting as an agent or broker for a handler in the performance of any function or act specified above. It does not include a producer who sells at a retail establishment which he owns and operates or who sells directly to consumers at a produce market, agricultural commodities produced by him and agricultural commodities produced by another producer subject to value limitation established by the board.

(h) "Marketing period" for an agricultural commodity shall be a period of time determined by the board

during which producers normally deliver for sale to handlers or contract with handlers for the production and future delivery for sale of substantially all of a crop or periodic production of the agricultural commodity.

(i) "Member" means a producer who has entered into a contract with an association appointing the association as his exclusive agent in negotiations with handlers with respect to the marketing of an agricultural commodity. (Mich. Comp. Laws §290.702.)

Sec. 2a. Any sale of a commodity by a producer to another producer for his own exclusive use and not for resale or any sale of fresh market produce directly to a consumer or to a retail store or stand for resale to consumers shall be excluded from the provisions of this act. (Mich. Comp. Laws §290.702a.)

Sec. 3. (1) An agricultural marketing and bargaining board is created within the department of agriculture. The board shall administer this act.

Membership; appointment; qualifications; terms of office.] (2) The board consists of 5 individuals who shall be citizens of the state appointed by the governor with the advice and consent of the senate, not more than 3 of whom shall be affiliated with the same political party. A minimum of 2 members of the board shall derive a substantial portion of their livelihood from agricultural enterprises. One member shall be considered a lay person, neither a producer, nor handler, nor a member of an association, as defined under this act. The governor shall designate 1 member of the board to serve as chairman of the board. The original board shall be composed of 2 members of the board for a 1-year term, 1 member of the board for a 2-year term, 1 member of the board for a 3-year term and 1 member of the board for a 4-year

term. The governor shall indicate the length of term when making the appointment of the original board. Thereafter, as the term of each member of the board expires, the governor, with the advice and consent of the senate, shall appoint a successor to serve for a term of 4 years. An individual appointed to fill a vacancy caused by other than expiration of the term shall be appointed only for the unexpired term of the member of the board whom he shall succeed.

Removal; procedure; cause.] (3) A member of the board may be removed by the governor, upon notice and hearing, for neglect of duty, or for corrupt conduct in office, or for any other misfeasance or malfeasance but for no other cause.

Vacancy, effect; quorum.] (4) A vacancy in the board shall not impair the right of the remaining members to exercise all of the powers of the board. Three members of the board constitutes a quorum.

Per diem.] (5) Members of the board are entitled to receive a per diem fixed by the legislature and all necessary traveling and subsistence expenses incurred while attending meetings of the board or engaged in the performance of official responsibilities delegated by the board or such other amounts as may be appropriated by the legislature.

Provision of implementation services.] (6) Services for implementing this act shall be provided by the department of agriculture from appropriations made therefor by the legislature.

Rules.] (7) The board may promulgate rules necessary for the administration of this act in accordance with and subject to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Compiled Laws of 1948. (Mich. Comp. Laws §290.703.)

Sec. 4. (1) Producers of agricultural commodities are free to join together voluntarily in associations as authorized by law without interference by handlers. A handler shall not engage nor permit an employee or agent to engage in any of the following practices, defined as unfair practices:

(a) To coerce a producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association or to refuse to deal with a producer because of the exercise of his right to join and belong to an association except as provided in section 15.

(b) To discriminate against a producer with respect to price, quantity, quality or other terms of purchase, acquisition or other handling of agricultural products because of his membership in or contract with an association.

(c) To coerce or intimidate a producer to breach, cancel or terminate a membership agreement or marketing contract with an association or a contract with a handler.

(d) To pay or loan money, give anything of value or offer any other inducement or reward to a producer for refusing or ceasing to belong to an association.

(e) To make or circulate unsubstantiated reports about the finances, management or activities of associations or handlers.

(f) To conspire, combine, agree or arrange with any other person to do or aid or abet the doing of any practice which is in violation of this act.

(g) To refuse to bargain with an accredited association with whom the handler has had prior dealings or with an accredited association whose producers in the bargaining units have had substantial dealing with the handler prior to the accreditation of the association.

(h) To negotiate with a producer included in the bargaining unit after an association is accredited.

Unfair practices.] (2) An association shall not engage nor permit an employee or agent to engage in the following practices, defined as unfair practices:

(a) To enter into a contract which discriminates against a producer represented by an accredited association whether or not he is a member producer.

(b) To act in a manner contrary to the by-laws of the association.

(c) To refuse to bargain with a handler with whom the accredited association has had prior dealing or with whom its producers have had substantial dealing prior to the accreditation of the association.

(d) To coerce or intimidate a handler to breach, cancel or terminate a membership agreement or marketing contract with an association or a contract with a producer.

(e) To make or circulate unsubstantiated reports about the finances, management or activities of other associations or handlers.

(f) To conspire, combine, agree or arrange with any other person to do or aid or abet the doing of any practice which is in violation of this act.

Violations or threatened violations; complaints; investigations; procedure.] (3) For the purpose of enforcing this act, the board may receive sworn complaints with respect to violations or threatened violations. The board may make all necessary investigations, examinations or inspections of any violation or threatened violation specified in the sworn complaint filed with the board. If upon such investigation, the board considers that there is reasonable cause to believe that a person charged has

committed a practice in violation of this act, the board shall issue and cause to be served a complaint upon the person in accordance with Act No. 306 of the Public Acts of 1969, as amended. The complaint shall summon the person to a hearing before the board or a member thereof or a hearing officer at the time and place fixed.

Determination as to violation; fact findings; cease and desist orders.] (4) If, upon a preponderance of the evidence, the board determines that the person complained of has committed a practice in violation of this act, it shall state its findings of fact and shall issue and cause to be served on the person an order requiring him to cease the violation and shall order further affirmative action as will effectuate the policies of this act.

Determination as to nonviolation; fact findings; dismissal.] (5) If, upon a preponderance of the evidence, the board is of the opinion that the person complained of has not committed a practice in violation of this act, it shall make its findings of fact and issue an order dismissing the complaint.

Modification or setting aside of findings or orders.] (6) Until the record in a case has been filed in a court, as provided in this act, the board at any time upon reasonable notice and in such manner as it deems proper, may modify or set aside, in whole or in part, any finding or order made or issued by it. (Mich. Comp. Laws §290.704.)

Sec. 5. (1) The board may petition the court of appeals for the enforcement of its orders, and for appropriate temporary relief or restraining order and shall file in the court the record in the proceedings. Upon the filing of the petition, the court shall cause notice to be served upon the person and thereupon shall have juris-

diction of the proceeding and of the question determined, and may grant temporary relief or restraining order as it deems just and proper and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the board. An objection that has not been urged before the board, a member thereof or a hearing officer before whom a hearing was conducted shall not be considered by the court, unless the failure or neglect to urge the objection shall be excused because of extraordinary circumstances. The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole is conclusive. If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the board, the court may order additional evidence to be taken before the board, a member thereof, or hearing officer and to be made a part of the record. The board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed and it shall file the modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that it shall be subject to review in accordance with established procedures for appeal.

Review by court of appeals; procedure.] (2) Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may

obtain a review of an order in the court of appeals, by filing in the court a written petition requesting that the order of the board be modified or set aside. A copy of the petition shall be transmitted by the clerk of the court to the board and the aggrieved party shall file in the court the record in the proceeding certified by the board. Upon the filing of the petition, the court shall proceed in the same manner as in the case of an application by the board under this section and shall have the same jurisdiction to grant temporary relief or a restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the board; the findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Commencement of proceedings; effect.] (3) The commencement of proceedings under this section shall not stay enforcement of the board's decision but the board or the reviewing court may order a stay upon such terms as it deems proper. (Mich. Comp. Laws §290.705.)

Sec. 6. (1) The board shall determine whether a proposed bargaining unit is appropriate. This determination shall be made upon the petition of an association representing not less than 10% of the producers of the commodity eligible for membership in the proposed bargaining unit as defined by the association. An association with an overlapping definition of bargaining unit may, upon the presentation of a petition by not less than 10% of the producers eligible for membership in the overlapping bargaining unit, contest the proposed bargaining unit. The board shall hold a hearing in accordance with Act No. 306 of the Public Acts of 1969, as amended, to resolve the dispute.

Factors in making determination.] (2) In making its determination, the board shall define as appropriate the largest bargaining unit in terms of the quantity of the agricultural commodity produced, the definition of the agricultural commodity, geographic area covered and number of producers included as is consistent with the following criteria:

(a) The community of interest of the producers included;

(b) The potential serious conflicts of interests among members of the proposed unit;

(c) The effect of exclusions on the capacity of the association to effectively bargain for the bargaining unit as defined;

(d) The kinds, types and subtypes of products to be classed together as agricultural commodity for which the bargaining unit is proposed;

(e) Whether the producers eligible for membership in the proposed bargaining unit meet the definition of "producer" for the agricultural commodity involved;

(f) The wishes of the producers;

(g) The pattern of past marketing of the commodity. (Mich. Comp. Laws §290.706.)

Sec. 7. An association shall be accredited upon determination by the board that the association meets all of the following:

(a) The association meets the requirements of the Capper-Volstead act, 7 USC 291-2.

(b) The association has submitted a copy of its bylaws which provide that: Each member of the association shall have 1 vote in all votes of the membership

of the association; that officers or directors shall be elected by a majority of the members voting or by delegates representing a majority of the membership; and that all elections shall be by secret ballot.

(c) The association has marketing and bargaining contracts for the current or next marketing period with more than 50% of the producers of an agricultural commodity who are in the bargaining unit and these contracts cover more than 50% of the quantity of that commodity produced by producers in the bargaining unit. The board may determine the quantity produced by the bargaining unit using information on production in prior marketing periods, current market information, and projections on production during the current market periods. The board shall exclude from that quantity any quantity of the agricultural commodity contracted by producers with producer owned and controlled processing cooperatives and any quantity produced by handlers. An association whose main purpose is bargaining but which processes a surplus into a form which is not the subject of bargaining is not a processing cooperative. The contracts with members shall specify the agricultural commodity and that the members have appointed the association as their exclusive agent in negotiations with handlers for prices and other terms of trade with respect to the sale and marketing of the agricultural commodity and obligate them to dispose of their production or holdings of the agricultural commodity through or at the direction of the association.

(d) The association has established and authorized a marketing and bargaining committee to negotiate with handlers for the agricultural commodity. The committee shall be comprised of members elected by the members in a secret ballot election. The production of the agricultural

commodity shall comprise a significant portion of the total farming operation of each committee member. Members who have any quantity of the commodity contracted with a producer owned and controlled processing cooperative are not eligible to serve on a marketing and bargaining committee for such commodity. (Mich. Comp. Laws §290.707.)

Sec. 8. (1) An association desiring accreditation shall file with the board a written request for accreditation in the form as required by the board. The request shall contain properly certified evidence that the association meets the standards for accreditation and shall be accompanied by a report of the names and addresses of members, the name of each handler to whom the member delivered or contracted to deliver the agricultural commodity during the previous 2 marketing periods and the quantity delivered. A fee to cover the costs of the board in processing the request shall be established by rule and paid by the association when the request is filed.

Report; form; contents; confidentiality of information.] (2) The board may require all handlers of an agricultural commodity produced in the bargaining unit area as individuals or through their trade association to file with the board within 30 days following a request, a report, properly certified, showing the correct names and addresses of all producers of the agricultural commodity who have delivered the agricultural commodity to the handler during the 2 marketing periods preceding the filing of the report and the quantities of the agricultural commodity received by the handler from each named producer during the periods. The information contained in the individual reports of handlers filed with the board shall not be made public by the board nor available to any person for private use. (Mich. Comp. Laws §290.708.)

Sec. 9. (1) Within 60 days following the date of filing with the board a request for accreditation by an association, the board shall determine whether the association shall be accredited. If the board determines that insufficient evidence was filed by the association, the board may permit the association to file an amended request for accreditation within 30 days following the determination and notification of the association.

Hearing; notice.] (2) Within 30 days following the board's preliminary finding that the association is to be accredited, the board shall hold a public hearing to obtain further evidence relevant to confirmation that the association is to be accredited. Producers of record involved in the bargaining unit shall be notified of the hearing by mail and publication in a newspaper of general circulation in the bargaining unit area at least 10 days prior to the date of the hearing. (Mich. Comp. Laws §290.709.)

Sec. 10. (1) The board shall issue and publish its determination within 30 days after the close of the hearing. If the determination of the board is to accredit the association, the board shall include a preliminary declaration of accreditation in its determination. The preliminary declaration of accreditation shall clearly state that the association shall represent all producers, members and nonmembers alike, who are in the bargaining unit and act as exclusive sales agents for the bargaining unit in negotiations with handlers. A producer covered in a declaration of accreditation may join the association and have full membership rights therein. Handlers shall deduct marketing service fees from the proceeds to be paid to producers for the agricultural commodity in the amount as determined by the association and forward the service fees promptly to the association. The fees shall be within

guidelines determined by the board and shall be subject to review by the board upon petition by 15% of the affected producers.

Accreditation; effectiveness; delay, petition; referendum; producers deemed to have assented.] (2) The accreditation of the association by the board shall be effective 30 days after the publication of the preliminary declaration of accreditation. The board shall delay the accreditation of the association whenever it receives during the 30-day period a petition signed by at least 1/3 of the producers in the bargaining unit who produce at least 1/3 of the production of the agricultural commodity produced by the bargaining unit, exclusive of quantities contracted with processing cooperatives and produced by handlers, and requesting that the association should not be accredited. The board shall determine by a mail referendum of bargaining unit producers within 30 days following receipt of the petition if producers assent to the accreditation of the association. Producers in the bargaining unit shall be deemed to have assented to accreditation if more than 50% of the producers in the bargaining unit who produce more than 50% of the volume of the affected commodity assent to representation by the association.

Notice of outcome of referendum; immediately effective accreditation; denial of accreditation.] (3) All affected producers, handlers and other interested parties shall be notified of the outcome of the referendum within 10 days following the referendum. Accreditation shall be effective immediately if producers assent. Accreditation shall be denied without the required assent of the producers.

Subsequent accreditation request; time.] (4) An association which is denied accreditation may not file another

request for accreditation for a period of 1 year. (Mich. Comp. Laws §290.710.)

Sec. 11. An accredited association shall file an annual report with the board in such form as required by the board to determine if the association continues to meet the requirements of accreditation as provided in section 7. (Mich. Comp. Laws §290.711.)

Sec. 12. To revoke the accreditation of an accredited association the board shall employ a procedure similar to the accreditation procedure set forth in sections 8, 9 and 10. Revocation of accreditation shall be considered by the board upon any of the following conditions:

(a) Upon receipt of a request from an accredited association for its own disaccreditation.

(b) Upon receipt of a petition requesting that the accredited association be disaccredited and bearing the signatures of at least 1/3 of the producers in the bargaining unit who produce at least 1/3 of the bargaining unit production of the agricultural commodity exclusive of quantities contracted with processing cooperatives and produced by handlers.

(c) A request for revocation of accreditation may not be accepted by the board during the marketing period or for a 60-day period prior thereto. (Mich. Comp. Laws §290.712.)

Sec. 13. (1) As used in this act, "bargaining" means the mutual obligation of a handler and an accredited association or their designated representatives to meet at reasonable times and confer and negotiate in good faith. The obligation does not require either party to agree to a proposal or to make a concession. An accredited association is the exclusive representative of all producers in the bar-

gaining unit for the purpose of bargaining with all handlers that purchase the agricultural commodity produced in the bargaining unit. Negotiations may include all terms relative to trading between handlers and producers of the agricultural commodity such as:

(a) Prices and related terms of sale.

(b) Quality specifications.

(c) Quantity to be marketed.

(d) Transactions involving products and services utilized by 1 party and provided to the other party.

(2) The parties shall notify the board of the commencement of negotiations. (Mich. Comp. Laws §290.713.)

Sec. 14. (1) Upon the request of an accredited association or upon the request of a handler, the board shall provide for the mediation of the issues in dispute. The board shall take such steps as it deems expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between the association and the handler which could disrupt the normal sale and purchase of the agricultural commodity between producers and the handler. The board shall:

(a) Arrange for, hold, adjourn or reconvene a conference or conferences between disputants and 1 or more of their representatives.

(b) Invite the disputants and their representatives to attend the conference and submit, orally or in writing, the differences between the disputants.

(c) Discuss the differences with the disputants or their representatives.

(d) Assist in negotiating and drafting agreements for the adjustment and settlement of differences.

Designee to act on behalf of board; powers; qualifications.] (2) In implementing its duties under this section, the board may designate 1 of its members or retain a competent individual to act in its behalf and may delegate to the designee its duties, and for such purpose, the designee shall have all of the powers conferred upon the board in connection with the discharge of the duties so delegated. If the board seeks to retain an individual to mediate a dispute, it shall attempt to retain an individual who has experience in mediation and in agricultural marketing.

Fee.] (3) Where an individual is retained, the board shall establish his fee in advance. (Mich. Comp. Laws §290.714.)

Sec. 15. At any time prior to 30 days before the first day of the marketing period, if an agreement on the issues in dispute between the accredited association and the handler has not been reached, the handler may elect not to purchase, directly or indirectly, any quantity of the agricultural commodity produced in the bargaining unit during the marketing period or the affected producers may elect, as represented by the association, not to sell, directly or indirectly, any quantity of the agricultural commodity to the handler during the marketing period. If either party makes an election, the other party is not under an obligation to continue bargaining with the party so electing during that marketing period. (Mich. Comp. Laws §290.715.)

Sec. 16. (1) If the election provided for in section 15 is not exercised by the association or the handler involved in negotiations, and if the issues in dispute are not agreed upon through good faith bargaining by the first day of the marketing period for the agricultural commodity, the parties shall be deemed to have consented to the settlement of all issues in dispute by arbitration and the

association shall agree that producers shall deliver the agricultural commodity to the handler or initiate the production of the agricultural commodity for future delivery to the handler and the handler shall accept delivery of the agricultural commodity or shall commit for the future delivery of the agricultural commodity. Where the quantity of the agricultural commodity to be marketed is in dispute, the handler shall offer to accept for delivery a reasonable quantity of the agricultural commodity. This offer shall be made in writing to the accredited association at least 7 days prior to the start of the marketing period. A copy of this offer shall be sent by registered mail to the board. The accredited association may file a claim for relief with the board if it feels that the offer is unreasonable. The board shall determine the issue of reasonableness at a hearing in accordance with Act No. 306 of the Public Acts of 1969, as amended. This determination shall have priority over all other board matters. The board shall base its determination on: (a) Projections as to the quantity of the agricultural commodity to be produced, (b) the relationship between the quantity of the commodity available and the amount of the quantity accepted by the handler, (c) the kind, grade, and quality of the commodity available, and (d) the past practices of the handler in relation to the items in subdivisions (a), (b) and (c). If, upon the preponderance of the evidence, the board is of the opinion that the quantity is unreasonable, it shall order the handler to accept the quantity which the board finds to be reasonable. The finding of the board shall be final, subject to later modification by the joint settlement committee. This finding shall be enforced in accordance with the provisions of section 5. Within 15 days following the start of the marketing period for the agricultural commodity, the board shall establish a joint settlement committee to arbitrate the issues in dispute.

Committee; membership; selection.] (2) The committee consists of 1 committeeman selected by the association, 1 committeeman selected by the handler and 1 committeeman selected by the committeeman representing the association and the handler. This third committeeman shall be chairman of the committee. If the third committeeman cannot be agreed upon by the association and the handler committeeman, the board shall submit a list composed of the names of 5 persons knowledgeable in the marketing of the agricultural commodity from which the third committeeman shall be chosen. The selection shall be made by the association representative and the handler representative each striking 2 different names from the list. The remaining name shall be the person who serves as the third committeeman and as its chairman. The order of striking shall be determined by chance. (Mich. Comp. Laws §290.716.)

Sec. 17. The chairman shall call a hearing to begin within 15 days and give reasonable notice of the time and place of the hearing. The chairman shall preside over the hearing and shall take testimony. Upon application and for good cause shown, and upon such terms and conditions as are just, a person, having a substantial interest therein may be granted leave to intervene by the committee. Any oral or documentary evidence and other data deemed relevant by the joint settlement committee may be received in evidence. The proceedings shall be informal. Technical rules of evidence shall not apply and the competency of the evidence shall not thereby be deemed impaired. A verbatim record of the proceedings shall be made and the chairman shall arrange for the necessary recording service. Transcripts may be ordered at the expense of the party ordering them but the transcripts shall not be necessary for a decision by

the committee. The expense of the proceedings, including a fee to the chairman, established in advance by the board shall be borne equally by each of the parties to the dispute and the state. The hearing conducted by the arbitration panel may be adjourned from time to time, but, unless otherwise agreed by the parties, shall be concluded within 30 days of the time of its commencement. Its majority actions and rulings shall constitute the actions and rulings of the joint settlement committee. (Mich. Comp. Laws §290.717.)

Sec. 18. The committee may administer oaths, require the attendance of witnesses, and the production of such books, papers, contracts, agreements and documents as may be deemed by it material to a just determination of the issues in dispute, and for such purpose may issue subpoenas. If any person refuses to obey a subpoena, or refuses to be sworn or to testify, or if any witness, party or attorney is guilty of any contempt while in attendance at any hearing, the committee may, or the attorney general if requested shall, invoke the aid of any circuit court within the jurisdiction in which the hearing is being held, which court shall issue an appropriate order. Any failure to obey the order may be punished by the court as contempt. (Mich. Comp. Laws §290.718.)

Sec. 19. The committee within 20 days after the conclusion of the hearing or such further time to which the parties may agree shall make written findings of fact and issue its written award upon the issues presented to it and upon the record made before it, and shall mail or otherwise deliver a true copy thereof to the parties or their representatives. The award of the committee shall be limited to the last offer of the association or the last offer of the handler which more nearly complies with the criteria contained in section 20. (Mich. Comp. Laws §290.719.)

Sec. 20. The committee shall base its decision upon the following factors:

(a) Prices or projected prices for the agricultural commodity paid by competing handlers in the market area or competing market areas.

(b) Amount of the commodity produced or projections of production in the production area or competing marketing areas.

(c) Relationship between the quantity produced and the quantity handled by the handler.

(d) The producers cost of production including the cost which would be involved in paying farm labor a fair wage rate.

(e) The average consumer prices for goods and services, commonly known as the cost of living.

(f) The impact of the award on the competitive position of the handler in the marketing area or competing areas.

(g) The impact of the award on the competitive position of the agricultural commodity in relationship to competing commodities.

(h) A fair return on investment.

(i) Kind, quality or grade of the commodity involved.

(j) Stipulation of the parties.

(k) Such other factors which are normally or traditionally taken into consideration in determining prices, quality, quantity and the costs of other services involved. (Mich. Comp. Laws §290.720.)

Sec. 21. A majority decision of the committee, if supported by competent, material and substantial evidence

on the whole record, shall be final and binding upon the parties, and may be enforced, at the instance of either party or of the committee in the court of appeals. (Mich. Comp. Laws §290.721.)

Sec. 22. A party who wilfully disobeys a lawful order of enforcement by the court of appeals pursuant to section 21, or wilfully encourages or offers resistance to such order shall be in contempt. The punishment for each day the contempt persists, may be a fine fixed in the discretion of the court in an amount not to exceed $500.00 per day. (Mich. Comp. Laws §290.722.)

Sec. 23. Awards of the committee shall be reviewable by the court of appeals but only for reasons that the committee was without or exceeded its jurisdiction; the award is unsupported by competent, material and substantial evidence on the whole record; or the award was procured by fraud, collusion or other similar and unlawful means. The pendency of such proceeding for review shall not automatically stay the order of the committee. (Mich. Comp. Laws §290.723.)

Sec. 24. Within 30 days after an accredited association negotiates a contract with a handler or receives a committee award, it shall send to the board by registered mail a copy of the contract or award. (Mich. Comp. Laws §290.724.)

Sec. 25. (1) At all reasonable times the board shall have access to and the right to copy evidence relating to any person or action under investigation by it in connection with any failure or refusal to bargain or for engaging in unfair practices.

Compelling attendance, testimony and production of evidence; contempt.] (2) In case of contumacy or refusal to obey a subpoena issued to any person, the circuit court,

upon application by the board, shall have jurisdiction to order such person to appear before the board to produce evidence or to give testimony touching the matter under investigation, and any failure to obey such order may be punished by the court as a contempt.

Service of documents; witness fees and mileage.] (3) Complaints, orders and other processes and papers of the board may be served personally, by registered mail, by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return of service shall be proof of the service. Witnesses summoned before the board shall be paid the same fee and mileage allowance that are paid witnesses in circuit court and witnesses whose depositions are taken and the person taking the same shall be entitled to the same fees as are paid for like services in circuit court.

Service of process.] (4) All processes of any court of which an application or petition may be made under this act may be served at any place in the state wherein the person or persons required to be served reside or may be found. (Mich. Comp. Laws §290.725.)

Sec. 26. The activities of accredited associations and handlers in bargaining with respect to the price and other terms of sale of the agricultural commodities produced by the members of such accredited associations do not violate any antitrust law of this state. (Mich. Comp. Laws §290.726.)

6. LIST OF INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC. JOINED AS PARTIES PLAINTIFF

1. Burnette Farms Packing Company, now known as Burnette Packing Corporation
2. Chase Orchards, a proprietorship
3. Cherry Growers, Inc., a corporation
4. Cherry Hill Orchards, a corporation
5. Coloma Cooperative Canning Company, a corporation
6. Duffy-Mott Company, Inc., a corporation
7. Eau Claire Packing Company, a corporation
8. Elk Rapids Packing Company, a corporation
9. Flamm Pickle & Packing Co., Inc., a corporation
10. Food Industries of America, a corporation
11. Frigid Foods Products Inc., a corporation
12. Gerber Products Company, a corporation
13. Heifetz Pickling Co., Division of Green Bay Food Co., a corporation
14. H. J. Heinz Company, a corporation
15. Indian Summer, Incorporated, a corporation
16. Jebavy Sorenson Orchard Company, a corporation
17. Kroupa's Inc., a corporation
18. Lake Odessa Canning Company, a corporation
19. Morrison's, Inc., a corporation
20. Michigan Fruit Canners, Inc., a division of Curtis-Burns, Inc.

21. Mason County Cold Storage, Inc., a corporation
22. A. F. Murch Company, a corporation
23. Musselman Fruit Products, a division of Pet Incorporated, a corporation
24. National Fruit Product Co., Inc., a corporation
25. New Era Canning Company, a corporation
26. Oceana Canning Company, a corporation
27. Onekema Packing Company, a corporation
28. Ore-Ida Foods, Inc., a corporation, a subsidiary of H. J. Heinz Co.
29. Packer's Canning Co., Inc., Honee Bear Div., a corporation
30. Paw Paw Grape Juice Co., a division of Warner Vinyards, a corporation
31. Peninsula Fruit Exchange, Inc. a corporation
32. Plainwell Canning Company, a corporation
33. Sawyer Fruit and Vegetable Cooperative Corporation, a corporation
34. Sherman Canning Co., a corporation
35. Silver Mill Frozen Foods, Inc., a corporation
36. Smeltzer Orchard Co., a corporation
37. Speas Company, a corporation
38. Spielmann Vinegar Company, a corporation
39. Stanek & Sons, Inc. a corporation
40. Stokeley-Van Camp, Inc., a corporation
41. Traverse City Canning Company, a corporation

42. United Foods, Inc., a corporation

43. Vlassic Foods, Incorporated, a subsidiary of Campbell Soup Company, a corporation

44. R. C. Warren & Company, Inc., a corporation